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Supreme Court, U.S.
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No.

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IN THE

# Supreme Court of the United States

October Term, 1999

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RAUL ORTIZ MIRANDA, CELENIA REYES PADILLA, MOISES CANDELARIA SILVA, JOSE ROSADO ROSADO AND ROSA MORALES SANTIAGO,

*Petitioners*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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75pp

## QUESTIONS PRESENTED FOR REVIEW

### I.

**WHETHER A FEDERAL JUDGE'S USE OF *EX PARTE* PROCEDURES TO PRE-SCREEN AND ELIMINATE PROSPECTIVE JURORS VIOLATED FED. R. CRIM. P. 43(A) AND THE FIFTH AND SIXTH AMENDMENT RIGHTS OF CRIMINAL DEFENDANTS TO BE PRESENT AND HAVE COUNSEL PRESENT AND PARTICIPATE IN ALL CRITICAL STAGES OF THE PROCEEDINGS?**

### II.

**WHETHER THE DENIAL OF PETITIONERS' FIFTH AND SIXTH AMENDMENT RIGHTS TO BE PRESENT AND TO HAVE COUNSEL PRESENT AND PARTICIPATE IN VOIR DIRE CONSTITUTES A FORM OF STRUCTURAL ERROR THAT REQUIRES A NEW TRIAL ABSENT ANY SPECIFIC SHOWING OF PREJUDICE?**

## LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings who were not listed in the caption of the case:

Marlene Aponte Cabrera, Esq.
Salvador Perez Moyol, Esq.
Enrique Velez-Rodriguez, Esq.
Lydia Lizarribar-Masini, Esq.

# TABLE OF CONTENTS


Page

QUESTIONS PRESENTED FOR REVIEW ..... i

LIST OF PARTIES TO THE PROCEEDINGS ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

OPINION BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

A. The Course of Proceedings Below ..... 3

B. The Voir Dire ..... 3

C. The Statement of the Facts ..... 8

D. The First Circuit's Decision ..... 8

REASONS FOR GRANTING THE WRIT ..... 9

I. THE VOIR DIRE PROCEDURE CONDUCTED BY THE DISTRICT COURT *EX PARTE* WAS A "CRITICAL STAGE" OF THE PROCEEDINGS AT WHICH PETITIONERS HAD THE RIGHT TO BE PRESENT AND PARTICIPATE, THROUGH COUNSEL, UNDER FED. R. CRIM. P. 43(A) AND THE FIFTH AND SIXTH AMENDMENTS ..... 9

II. THE DENIAL OF PETITIONERS' RIGHT TO BE PRESENT AND TO HAVE COUNSEL PRESENT AND PARTICIPATE IN VOIR DIRE IS A FORM OF STRUCTURAL ERROR THAT REQUIRES AUTOMATIC VACATUR OF THE ENSUING CONVICTIONS 11

CONCLUSION ..... 14

## TABLE OF AUTHORITIES

**Page**

### Cases

*Arizona v. Fulminante*,
499 U.S. 279, 111 S.Ct. 1246,
113 L.Ed.2d 302 (1991) . . . . . 11-12

*Brecht v. Abrahamson*,
507 U.S. 619, 113 S.Ct. 1710,
1717-18, 123 L.Ed.2d 353 (1993) . . . . . 11

*Coleman v. Alabama*,
399 U.S. 1, 90 S.Ct. 1999,
26 L.Ed. 2d 387 (1970) . . . . . 12

*Curtis v. Duval*,
124 F.3d 1 (1st Cir. 1997) . . . . . 11

*Hegler v. Borg*,
50 F.3d 1472 (9th Cir. 1995) . . . . . 13

*Penson v. Ohio*,
488 U.S. 75, 88, 109 S.Ct. 346,
102 L.Ed.2d 300 (1988) . . . . . 11-12

*Perry v. Leeke*,
488 U.S. 272, 109 S.Ct. 594,
102 L.Ed.2d 624 (1989) . . . . . 12

*Rice v. Wood*,
44 F.3d 1396 (9th Cir. 1995) . . . . . 13

*Rushen v. Spain*,
464 U.S. 114, 104 S.Ct. 453
78 L.Ed.2d 267 (1983) (per curiam) . . . . . 9, 12-13

*United States v. Camacho*,
955 F.2d 950 (4th Cir. 1992) . . . . . 9

*United States v. Candelaria-Silva*,
166 F.3d 19 (1st Cir. 1999) . . . . . 1, 8-9, 12

*United States v. Cronic*,
466 U.S. 648, 104 S.Ct. 2039,
80 L.Ed.2d 657 (1984) . . . . . 11-12

*United States v. Gordon*,
829 F.2d 1119 (D.C. Cir. 1987) . . . . . 9

*United States v. Mills*,
138 F.3d 928 (11th Cir. 1998) . . . . . 12

*United States v. Paradies*,
98 F.3d 1266 (11th Cir. 1996) . . . . . 9

*United States v. Parent*,
954 F.2d 21 (1st Cir. 1992) . . . . . 10

*Yarborough v. Keane*,
101 F.3d 894 (2d Cir. 1996),
*cert. denied*, 520 U.S. 1217, 117 S.Ct. 1706,
137 L.Ed.2d 831 (1997) . . . . . 13

## Constitution, Statutes & Rules

U.S. Const., Amend. V . . . . . 2, 8-9, 12

U.S. Const., Amend. VI . . . . . 2, 8-9, 12

21 U.S.C. § 846 . . . . . .

28 U.S.C. § 1254(1) . . . . . 1

Fed. R. Crim. P. 43(a) . . . . . 2, 8-10

## OPINIONS BELOW

Petitioners seek review of the January 22, 1999, opinion of the United States Court of Appeals for the First Circuit, reported at *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999). *See* **APPENDIX A**. Petition For Rehearing was timely filed on February 5, 1999. On March 19, 1999, the First Circuit denied the Petition For Rehearing. *See* **APPENDIX B**. However, as discussed below, the First Circuit never served Petitioners or their counsel with the denial.

## JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). However, the time to file this petition -- *i.e.*, 90 days from the date of the denial of the petition for rehearing -- expired on June 17, 1999. Under Supreme Court Rule 13, the Court may nonetheless entertain this Petition and waive the time limits of Rule 13 for extraordinary circumstances. Those circumstances exist in this case.

The Petitioners were represented by appointed counsel on appeal before the First Circuit. Throughout the appellate process, they intended to seek review by this Court of any adverse decision by the First Circuit. After the First Circuit affirmed their convictions on January 22, 1999, Petitioner Raul Ortiz Miranda timely filed a Petition For Rehearing and Petitioners Celenia Reyes Padilla, Moises Candelaria Silva, Jose Rosado Rosado and Rosa Morales Santiago adopted that Petition. Although the Petition For Rehearing was denied by the First Circuit on March 19, 1999, the First Circuit inadvertently failed to notify counsel for the Petitioners. Attached hereto as Composite **APPENDIX C** are sworn

affidavits from each of the attorneys for the Petitioners. Each such attorney has indicated that he or she never received notification from the First Circuit that the Petition For Rehearing had been denied and first learned about the denial in late December 1999. Since the time bar which now exists in this case was due solely to the First Circuit's failure to serve counsel with the denial of the petition for rehearing, this Court should waive the time bar and reach the merits of the instant petition.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, the pertinent portions of which are set forth below:

> No person shall ... deprived of life, liberty, or property, without due process of law....

U.S. CONST., AMEND. V.

> In all criminal prosecutions, the accused shall enjoy the right to ... an impartial jury ... and to have the Assistance of Counsel for his defense.

U.S. CONST., AMEND. VI.

This case also involves the following provision of the Federal Rules of Criminal Procedure:

> The defendant shall be present ... at every stage of the trial including the impaneling of the jury ... except as otherwise provided by this rule.

Fed. R. Crim. P. 43(a).

# STATEMENT OF THE CASE[1]

## A. The Course of Proceedings Below

On June 7, 1995, a 50-count superseding indictment was returned against the Petitioners, Raul Ortiz Miranda, Celenia Reyes Padilla, Moises Candelaria Silva, Jose Rosado Rosado and Rosa Morales Santiago, and twenty-six (26) co-defendants in the District of Puerto Rico. (D. 322.) The indictment alleged that Petitioners were members of a drug trafficking organization run by Israel Santiago-Lugo. (*Id.*) Count 1 charged Petitioners with conspiring, between 1988 and the date of the indictment, to possess with intent to distribute cocaine, heroin and marijuana, in violation of 21 U.S.C. § 846. The remaining counts of the indictment included substantive drug, weapons, money laundering and forfeiture allegations. (*Id.*)

On August 20, 1995, the district court, Honorable José A. Fuste, severed the defendants into two groups for trial. (D. 511.) The Petitioners herein were assigned to the first group. They went to trial between September 13, 1995 and December 13, 1995 and were subsequently convicted.

## B. The Voir Dire

With no notice to Petitioners or their counsel, on the morning of September 13, 1995, the district court summoned a venire of 80 jurors to federal court, pursuant to the District Plan for the District of Puerto Rico. After giving the venire an orientation speech, the

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[1] "D." refers to the consecutively numbered items contained in the Docket Sheets of the District of Puerto Rico below. "T" refers to the trial transcript.

court had the venire fill out jury questionnaires devised by the court. (T. 9/13/95, a.m. session, pp. 1-8.) Because of numerous absences due to Hurricane Luis, more prospective jurors were summoned that afternoon for a second, similar orientation session. (T. 9/13/95 afternoon session.)

Unbeknownst to counsel, the government or the Petitioners at the time, when the questionnaires were completed, a clerk delivered them to the district court. The court, in chambers, proceeded to eliminate 14 of the prospective jurors "for cause" based upon their answers on the questionnaire. The only record of the court's conduct consists of the court's handwritten notations on the jury questionnaires of the 14 jurors, which the court sealed and later made a part of the record. (*See* D. 653-655.)

Of the 14 jurors stricken by the court, 6 were struck because they checked the box on the questionnaire -- which was submitted to the venire ***only*** in English -- indicating that they had some "difficulty" with the English language. Of the 6 prospective jurors who checked this box (juror numbers 16, 17, 18, 19, 61 and 93) only ***one*** (juror no. 17) filled out the narrative portions of the form in Spanish. The other 5 jurors who professed to have "difficulty" with the English language were not only able to read and fill out the English language questionnaire without any apparent trouble but were able to write full, grammatically correct, narrative sentences ***in English*** in answer to many of the questions.

According to the court's notations, 3 jurors were stricken because they had vacation plans (juror numbers 35, 63 and 72). ***None*** of these three prospective jurors indicated that the vacations were prepaid.

The court struck 2 jurors for health-related reasons. The first of these jurors, juror number 13, in answer to the question about whether he had "any physical problem (for example, sight...)" actually checked the "no" box. He was nonetheless stricken -- apparently, because at the end of the questionnaire he added: "Note, eye ... (unintelligible)." The second juror stricken for medical reasons, juror number 89, merely indicated that he had a rapid heart beat and had to have medical checkups every two months.

The remaining 3 jurors were stricken by the district court for various hardship excuses. Juror number 3 was a telemarketer with one part time assistant. The juror did not, however, indicate on the form how jury service would harm his business.

Juror number 32 indicated that she was "taking care of my mother" who was in the hospital and her "grandmother at home." However, she expressly added on the form that "I will be very proud to participate as a juror. Please let me know what I should do." The court struck her, despite her professed desire to remain as a juror.

Finally, the court struck juror number 70 even though he did ***not*** object to serving as a juror ***anywhere*** on the form. The district court apparently struck him, because he listed his employment as a night shift medical technician at a hospital. There is no indication on the form that his services were necessary to the function of the hospital.

The following morning, September 14, 1995, jury selection began. As previously indicated, the district court did not voluntarily disclose that it had unilaterally stricken 14 prospective

jurors from the venire. The remaining jurors were called by number. (T1-58-122.) Juror number 8 checked the box on the questionnaire indicating that she had difficulty understanding English. (T1,.a.m. session, p. 121.) Yet, the district court did not strike her for cause, as he had 6 jurors the day before.

Similarly, during the voir dire, the district court refused to strike for health reasons juror numbers 7, 64, 71. (T1, a.m. session, pp. 106, 108.) Juror number 64 had indicated on his form that he had high blood pressure and took medication for it daily. He also visited a cardiologist every two months, just like juror number 89, who the district court had *sua sponte* stricken for cause the day before. Similarly, juror number 71 indicated that he suffered from hypertension, took daily medication for it and had "periodic" visits to doctor.

The only reason the district court's conduct came to light in this case was because Ortiz-Miranda's trial counsel kept a list of missing juror numbers and noticed that numbers were missing. When she asked why, the district court revealed what had occurred the day before. (T1, a.m. session, p. 123.) According to the court, the jurors "excused yesterday" were jurors whose forms allegedly made it "obvious" that they could not serve. (*Id.* at 123-24.) When counsel objected to the court's conduct as being contrary to the District Plan and to not being told about the court's conduct in advance, the court responded: "Well, you don't have to be apprised of -- of those things--." (*Id.* at 125.) The court claimed it had a right to *sua sponte* strike the jurors *ex parte*. (*Id.* at 126.)

Counsel renewed her objections, this time on constitutional grounds, under the Fifth and Sixth Amendments, arguing that if counsel had been allowed to be present they might have convinced

the court to keep some of the jurors in the venire. (*Id.* at 127.) The court responded: "Well, you have the right to take a look at that material, and if you find something there that you think is objectionable, that I exercised the improper discretion, if you will, you have a point." (*Id.* at 127.)

Counsel then asked to read the transcript of what happened. The court indicated it was not available. Counsel asked that jury selection be delayed until 30 more jurors can be summoned, so that the defense could have "a participatory role" in jury selection. The court summarily denied the request and stated only that the court would make the forms available at some future date so that there would be an "accounting" of what happened. (*Id.* at 129-30.) When counsel asked that the accounting take place immediately, the court denied the request and compelled counsel to pick a jury from the existing venire. (*Id.* at 130.)

That afternoon, following opening statements, the court gave counsel a list of the jurors who had been stricken and promised to give copies of their questionnaires to counsel. (T1, p.m. session, pp. 52-53.)

The record does not disclose when the questionnaires were actually provided to counsel. However, after the verdict was returned, defense counsel moved to dismiss the case and renewed her objections to the court's use of *ex parte* jury selection procedures. She further indicated that a review of the questionnaires did not support the court's decision to unilaterally remove them without consulting with counsel. (T55-5104-06.) The court rejected counsel's objections. (T55-5109-10.)

After approximately 10 days of deliberations, the jury convicted the Petitioners as charged. (D. 917-920; T55-5093-96). On April 19, 1996, the district court sentenced Petitioners to lengthy prison terms. (ST 76; D. 1220.)

### C. Statement of the Facts

The Petitioners adopt, solely for purposes of this Petition, the factual presentation contained in the Panel opinion. *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999). *See* **Appendix A**.

### D. The First Circuit's Decision

In their appeals to the First Circuit, Petitioners argued, among other things, that the district court's use of *ex parte* procedures to eliminate presumptively qualified jurors violated Fed. R. Crim. P. 43(a) and their constitutional rights under both the Fifth and Sixth Amendments. The First Circuit chose, instead, to analyze Ortiz-Miranda's claims as if they had been predicated on the Jury Selection Act. *See Candelaria-Silva*, 166 F.3d at 29-33. The First Circuit found that the district court had indeed improperly stricken several jurors but held that any violation of the Jury Selection Act was too insubstantial to warrant relief. *Id.* at p. 31.

The First Circuit then addressed the claims actually raised by Petitioners in a single, conclusory paragraph:

> Defendant-appellants also argue that their rights under the Fifth Amendment, the Sixth Amendment and Fed. R. Crim. P. 43 were violated by the district court's ex parte actions. To the extent that the district court improperly dismissed four prospective jurors, we conclude that the errors were harmless to the defendants. *See id.* at 1270 n. 11 (stating

that the error must be sufficiently egregious to constitute a constitutional violation).

*Id.* at p. 33.[2]

## REASONS FOR GRANTING THE WRIT

### I. THE VOIR DIRE PROCEDURE CONDUCTED BY THE DISTRICT COURT *EX PARTE* WAS A "CRITICAL STAGE" OF THE PROCEEDINGS AT WHICH PETITIONERS HAD THE RIGHT TO BE PRESENT AND PARTICIPATE, THROUGH COUNSEL, UNDER FED. R. CRIM. P. 43(A) AND THE FIFTH AND SIXTH AMENDMENTS

A defendant's right to be present at all critical stages of his trial is "fundamental." *Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (per curiam). The empanelment of a jury is one such "critical stage." *United States v. Camacho*, 955 F.2d 950, 952 (4th Cir. 1992). "A defendant's absence during the impaneling of the jury certainly frustrates the fairness of the trial" and, therefore, violates the Fifth Amendment. *Camacho*, 955 F.2d at 953, citing *United States v. Gordon*, 829 F.2d 1119 (D.C. Cir. 1987). This basic right has been codified in Fed. R. Crim. P. 43, which requires the presence of defendants "at every stage of the trial ***including the impaneling of the jury***." (Emphasis added.)

The right to be present and participate, through counsel, in decisions concerning the jury were recognized by the First Circuit

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[2] The First Circuit's reference to a citation at "*id.* at 1270, n. 11" appears to be inaccurate. The court may have been referring to *United States v. Paradies*, 98 F.3d 1266, 1281 n. 28 (11th Cir. 1996), which summarily rejected a Sixth Amendment claim similar to the one raised by the Petitioners.

itself in *United States v. Parent*, 954 F.2d 21 (1st Cir. 1992). In *Parent*, the jury asked to be reinstructed on the definition of "constructive possession" and the district court gave the jury a written "constructive possession" instruction without informing counsel. The court noted that under "ordinary circumstances" the district court's response would have been "unexceptional." 954 F.2d at 26. The instruction given by the district court accurately stated the law. However, the court recognized that the "real harm is not that the trial judge might have misstated the law ... but that the aggrieved party will have lost the value of the chance: the opportunity to convince the judge that some other or different response would be more appropriate, the circumstances considered." *Id.* Thus, defense counsel might have convinced the court not to have issued ***only*** the instruction on constructive possession where "the danger of over-emphasis is acute." *Id.* Alternatively, the court recognized that defense counsel might have convinced the district court to "withhold the written" instruction or to couple the constructive possession instruction with other instructions. *Id.* "Being kept in the dark, defense counsel were powerless to prime the pump of persuasion." *Id.* In *Parent*, the First Circuit reversed a defendant's conviction for the Rule 43(a) violation absent any particular showing or prejudice.

Like the defendant in *Parent*, the Petitioners and their counsel in this case were "kept in the dark" and, therefore, they "were powerless to prime the pump of persuasion." Had they been allowed to participate in the procedure, many of the 14 jurors stricken by the district court may have been qualified to serve. Indeed, the record of the district court's conduct -- to the extent that it exists -- does ***not*** support the court's after-the-fact explanation. The forms filled out by at least 5 of the 6 jurors who

checked the box indicating some difficulty with English belied that excuse on their face. The court struck at least two jurors (juror numbers 13 and 70) who did not even object to serving. And, the court later refused to strike for cause several jurors whose questionnaires were virtually identical to the ones filled out by jurors who the court struck.

## II. The Denial of Petitioners' Right To Be Present And To Have Counsel Present and Participate In Voir Dire Is a Form of Structural Error That Requires Automatic Vacatur of the Ensuing Convictions

In this case, the district court not only violated ***the Petitioners***' right to be present, by conducting the voir dire absent counsel, the court violated the Petitioners' Sixth Amendment rights to have their counsel present and participate. A defendant has not only the right to be present himself at all critical stages but, under the Sixth Amendment, to have counsel present as well. *Curtis v. Duval*, 124 F.3d 1 (1st Cir. 1997). The absence of counsel at a critical stage of the proceedings creates a presumption of prejudice and "renders an otherwise acceptable trial unfair." *Curtis*, 124 F.3d at 4, citing *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984); *Penson v. Ohio*, 488 U.S. 75, 88, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).

This Court recognizes two types of errors in criminal cases. "Trial error" is subject to traditional "harmless error" review, while "structural defects" require reversal without further review. *See generally Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 113 S.Ct. 1710, 1717-18, 123 L.Ed.2d 353 (1993); *Arizona v. Fulminante*, 499 U.S. 279, 307-10, 111 S.Ct. 1246, 1263-65, 113 L.Ed.2d 302 (1991). A trial error "is one that occurs 'during the presentation of

the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'" *United States v. Mills*, 138 F.3d 928, 945 (11th Cir. 1998) (Hatchett, C.J., dissenting), quoting *Fulminante*, 499 U.S. at 307-08, 111 S.Ct. at 1263-64. "A structural defect, on the other hand, affects 'the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Ibid.*

*Cronic* and *Fulminante* teach that the complete deprivation of counsel is a form of structural error that is not subject to the harmless error rule. *See Cronic*, 466 U.S. at 661-63, 104 S.Ct. at 2047; *Fulminante*, 499 U.S. at 307, 111 S.Ct. at 1263. *See also Perry v. Leeke*, 488 U.S. 272, 278-79, 109 S.Ct. 594, 599, 102 L.Ed.2d 624 (1989); *Penson v. Ohio*, 488 U.S. 75, 88, 109 S.Ct. 346, 354, 102 L.Ed.2d 300 (1988). However, the Court in *Fulminante* also noted that a less significant denial of the right to counsel (at a preliminary hearing) has been held to be subject to harmless error review. *Fulminante*, 499 U.S. at 307, 111 S.Ct. at 1263, citing *Coleman v. Alabama*, 399 U.S. 1, 10-11, 90 S.Ct. 1999, 2003-04, 26 L.Ed. 2d 387 (1970). Similarly, the Court in *Fulminante* cited *Rushen* as an example of a presence violation which was subject to harmless error review. *Id.*, 499 U.S. at 307, 111 S.Ct. at 1263. In *Rushen*, a defendant's absence from two conversations between the trial judge and a juror was held to be harmless. *Rushen*, 464 U.S. at 120-21, 104 S.Ct. at 456-57. That very opinion, however, makes clear that in egregious circumstances a violation of the right to be present might constitute structural error. *Id.*, 464 U.S. at 117 n. 2, 104 S.Ct. at 455 n. 2 (explaining that "violations of the right to be present during all critical stages of the proceedings" are "as with most [violations of] constitutional

rights, ... subject to harmless-error analysis, ***unless the deprivation, by its very nature, cannot be harmless***") (emphasis added; internal citations omitted). *Accord Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 1995) ("a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal").

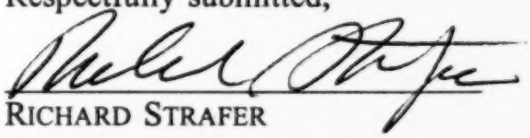
Accordingly, while momentary or trivial deprivations of counsel and the right to be present from peripheral proceedings may be subject to harmless error review, *see, e.g., Yarborough v. Keane*, 101 F.3d 894, 898 (2d Cir. 1996) (holding that defendant's exclusion from hearing to question witness was harmless because hearing was "extremely brief," "not even a part of the trial proper," and "of little significance"), *cert. denied*, 520 U.S. 1217, 117 S.Ct. 1706, 137 L.Ed.2d 831 (1997), a denial of both rights during a critical stage is not. *See Rice v. Wood*, 44 F.3d 1396 (9th Cir. 1995) (defendant's absence from the return of death verdict was a structural defect in the criminal proceedings that was not subject to harmless error).

The selection of a jury, especially where presumptively qualified jurors are eliminated *ex parte*, is neither "trivial" nor "of little significance." The selection of a jury is a critical stage of the proceedings and affects the integrity and legitimacy of the entire criminal trial. The trial in this case was structurally unsound. This Court should grant the Petition to correct the confusion caused by the First Circuit's opinion in *Candelaria-Silva* concerning the fundamental nature and importance of voir dire.

## CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that their Petition For a Writ of Certiorari to the United States Court of Appeals for the First Circuit be granted.

Respectfully submitted,



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# APPENDIX "A"

*United States Court of Appeals*
*For the First Circuit*

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No. 96-1711

UNITED STATES,
Appellee,

v.

EULALIO CANDELARIA-SILVA, A/K/A GATILLO MACHO,
Defendant, Appellant.

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No. 96-1712

UNITED STATES,
Appellee,

v.

RAUL ORTIZ-MIRANDA, A/K/A CANO BEEPER,
Defendant, Appellant.

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No. 96-1713

UNITED STATES,
Appellee,

v.

MOISES CANDELARIA-SILVA,
Defendant, Appellant.

---

No. 96-1714

UNITED STATES,
Appellee,

v.

CELENIA REYES-PADILLA,
Defendant, Appellant.

---

No. 96-2275

UNITED STATES,
Appellee,

v.

JOSE A. ROSADO-ROSADO,
Defendant, Appellant.

---

No. 96-2362

UNITED STATES,
Appellee,

v.

NELSON MIGUEL ORTIZ-BAEZ,
Defendant, Appellant.

---

No. 96-2364

UNITED STATES,
Appellee,

v.

ROSA MORALES-SANTIAGO,
Defendant, Appellant.

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. José Antonio Fusté, U.S. District Judge]

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Before

Torruella, Chief Judge,

Lynch and Lipez, Circuit Judges.

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Raymond L. Sánchez-Maceira, by appointment of the Court, for appellant Eulalio Candelaria-Silva.
G. Richard Strafer, by appointment of the Court, with whom Quiñon & Strafer, P.A., was on brief, for appellant Raúl Ortiz-Miranda.
Enrique Vélez-Rodríguez, by appointment of the Court, for appellant Moisés Candelaria-Silva.
Salvador Pérez-Mayol, by appointment of the Court, for appellant Celenia Reyes-Padilla.
Lydia Lizarribar-Masini, by appointment of the Court, for appellant José Rosado-Rosado.
Rafael Anglada-López, by appointment of the Court, for appellant Nelson Miguel Ortiz-Báez.
Marlene Aponte-Cabrera, by appointment of the Court, for appellant Rosa Morales-Santiago.
Lena D. Watkins, Trial Attorney, Narcotic and Dangerous Drug Section, Criminal Division, U.S. Department of Justice, with whom James K. Robinson, Assistant Attorney General, Criminal Division, U.S. Department of Justice, Theresa M.B. Van Vliet, Chief, Narcotic and Dangerous Drug Section, Criminal Division, U.S. Department of Justice, Robert Lipman and Grace Chung Becker, Trial Attorneys, Narcotic and Dangerous Drug Section, Criminal Division, U.S. Department of Justice,

were on brief for appellee.
January 22, 1999

**TORRUELLA, Chief Judge.** Defendant-appellants were charged with conspiracy to possess with intent to distribute and distribution of cocaine base, cocaine, heroin, and marijuana, in violation of 21 U.S.C. §§ 841 & 846. In addition, Count 43 of the indictment charged Nelson Ortiz-Báez ("Ortiz-Báez") with engaging in a monetary transaction in criminally derived property, in violation of 18 U.S.C. § 1957. Count 46 charged Eulalio and Moisés Candelaria-Silva with possessing cocaine base, cocaine and heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Count 49 alleged the defendants' joint and several liability for forfeiture of $6,000,000, including substitute assets, as authorized by 21 U.S.C. § 853.

The jury returned guilty verdicts as to all of the defendants in this appeal as well as special forfeiture verdicts. The district court sentenced the defendants to the following terms of imprisonment: (1) 480 months for Ortiz-Báez; (2) 540 months for Raúl Ortiz-Miranda ("Ortiz-Miranda"); (3) 210 months for Celenia Reyes-Padilla ("Reyes-Padilla"); (4) 168 months for Rosa Morales-Santiago ("Morales-Santiago"); (5) 660 months for Eulalio Candelaria-Silva; (6) 360 months for Moisés Candelaria-Silva; and (7) 480 months for José Rosado-Rosado ("Rosado-Rosado"). The district court also issued a Final Order of Forfeiture encompassing substitute property of Reyes-Padilla, pursuant to 21 U.S.C. § 853(p).

Defendants base their appeal on numerous evidentiary and procedural grounds. For the following reasons, we

**AFFIRM** the judgment of the district court.

**BACKGROUND**The government presented the testimony of three co-conspirator witnesses, Marcos Hidalgo-Meléndez ("Hidalgo"), Carlos Otero-Colón ("Otero-Colón"), and Noemí García-Otero ("García-Otero"). Hidalgo pleaded guilty to Count One of the Superseding Indictment. Otero-Colón and García-Otero received immunity from prosecution in exchange for their cooperation. In addition, the government presented the testimony of numerous local police officers who executed search warrants

or were otherwise involved in the investigation of the defendants and their co-conspirators. The government also presented documentary and forensic evidence and testimony relating to firearms and drugs seized from the co-conspirators, and other pertinent evidence.

The co-conspirator witnesses testified that Israel Santiago-Lugo ("Santiago-Lugo") operated several drug distribution points ("puntos") at various housing projects in the northern region of Puerto Rico. With the assistance of his co-conspirators, Santiago-Lugo distributed vast quantities of controlled substances including: 1) heroin sold under the name "cristal"; (2) cocaine sold under the names "bolso rojo" and "rolito"; (3) cocaine base; and (4) marijuana.

**A. The Virgilio Dávila Punto**

Hidalgo testified that he, Ortiz-Báez, and Wilfredo and David Martinez-Matta began working for Santiago-Lugo's drug distribution ring sometime after Hidalgo moved to the Virgilio Dávila housing project in 1990. He also testified that Ortiz-Báez and others packaged drugs at two rented apartments in Isla Verde and transported the drugs to various puntos. Hidalgo further testified that Reyes-Padilla, Santiago-Lugo's aunt, distributed drugs from a Virgilio Dávila apartment used by Santiago-Lugo's grandparents. From this apartment, Morales-Santiago supplied Santiago-Lugo's distributors with drugs, including heroin and cocaine, and maintained a ledger to account for the drugs and proceeds.

On October 6, 1989, the Police of Puerto Rico ("POPR") executed a search warrant at Virgilio Dávila building 43, apartment 411. Reyes-Padilla was at the apartment with her parents. The search yielded twenty-six grams of cocaine and three grams of heroin packaged in over 250 small bags. Later, on October 17, 1989, the POPR executed a search warrant at the same apartment. When an officer first arrived, a young man was selling a controlled substance through an iron grating on the apartment door. When the officer identified himself, the man fled inside the apartment. A search of the apartment yielded two grams of heroin, less than a gram of cocaine, and over $2000 in U.S. currency.

At trial, POPR officer Angel Nieves-Domínguez testified that, pursuant to a tip, he conducted surveillance of Reyes-Padilla at Virgilio Dávila

building 43, apartment 412 during the afternoon of October 1 and the morning of October 2, 1991. On the first day, he observed Reyes-Padilla and Santiago-Lugo retrieve two large bags from the trunk of Santiago-Lugo's car. Upon reaching the stairs to building 43, Santiago-Lugo opened one of the brown bags and pulled out several transparent plastic bags that each contained smaller red bags. As Santiago-Lugo distributed the plastic bags to the persons assembled, Reyes-Padilla made notations in a notebook. Additionally, upon receiving the packages, some recipients hid the packages in nearby garbage cans or bushes. Reyes-Padilla took the other large brown bag up to apartment 412.

After Santiago-Lugo left, the officer observed one individual -- who had received a package from Santiago-Lugo -- apparently selling some of the smaller red bags to a young woman near building 44. Shortly thereafter, a young man arrived at apartment 412, and Reyes-Padilla sold the man a transparent bag appearing to contain heroin. The next day, the officer saw Santiago-Lugo arrive and deliver yet another brown bag to Reyes-Padilla.

Later that month, POPR executed a search warrant at apartment 412. At that time, defendants Reyes-Padilla and Morales-Santiago were in the apartment. The search yielded four "decks" of heroin in a Sucrets box, approximately $100,000 in U.S. currency, and two notebooks appearing to contain records of drug deliveries and debts.

In November, POPR officers observed Rosado-Rosado and a minor each engage in an apparent sale of controlled substances and give the proceeds from the sale to a heavy-set individual. Rosado-Rosado retrieved the drugs from a brown paper bag in his back pants pocket. When officers entered the housing project, Rosado-Rosado and the minor attempted to flee. Officers caught Rosado-Rosado and seized eighteen aluminum foil packets containing heroin and five bags containing cocaine.

Hidalgo testified at trial about the importance of the Virgilio Dávila punto as a drug distribution site. He stated that he personally received packages of cocaine and heroin from Morales-Santiago to distribute on behalf of Israel Santiago-Lugo, and that he observed distributors from Santiago-Lugo's other puntos arrive at Virgilio Dávila and receive packages from Morales-Santiago. He identified four pages of notebook entries under the

name "Batman" from the notebook seized in October 1991 that pertained to his distribution of marijuana and cocaine at Virgilio Dávila.

Among the entries in the notebook was one pertaining to fifty packets of heroin, referred to as "C" to correspond to "cristal," and one pertaining to fifty packets of cocaine, referred to as "R" because of the brand name "bolso rojo." Expert testimony showed that the entries recorded transactions transpiring almost daily between October 29, 1990 and October 24, 1991. The notebooks contained a "price structure" table which specified the prices of multiple units with a base price of $75 per unit. A conservative estimate of the amount of drugs distributed would be close to 50,000 units having a total value of approximately $3.5 million dollars.

**B. The Rosario Brothers**

In 1993, Hidalgo learned that Santiago-Lugo and the Rosario brothers had become adversaries. Santiago-Lugo and the Rosarios previously had agreed to share control of the drug distribution punto at Virgilio Dávila in Bayamón. According to Hidalgo, the enmity between them stemmed from a drug debt owed to Santiago-Lugo by one of the Rosarios. Tensions escalated in early 1993 when a Santiago debt collector and a Rosario associate were both murdered.

In June 1993, Hidalgo sustained a gunshot wound when an unknown assailant or assailants fired a barrage of bullets from a moving vehicle near Virgilio Dávila. After recuperating, Hidalgo again rejoined the conspiracy. On December 1, 1993, Hidalgo, Ortiz-Báez, Santiago-Lugo, and co-conspirator Andrés Colón-Miranda were arrested in Bayamón. Ortiz-Báez, Hidalgo, and Colón-Miranda were in possession of firearms without proper permits. Hidalgo testified that they were armed due to the ongoing tensions with the Rosario brothers.

**C. The Los Murales Punto**[1]

Otero-Colón testified that, sometime in 1988 or 1989, Santiago-Lugo's brother Raúl and Jorge Martínez-Rosado ("Fobi") reached an agreement with José Román Freites ("Josean") for the distribution of cristal heroin at

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[1]"Punto," which is Spanish for "point," is in drug slang a place or location where drugs routinely are bought and sold.

Los Murales. Otero-Colón, who had served as a lookout for Josean for approximately two months, became a runner who picked up drugs from Virgilio Dávila. He testified that he began picking up fifty packages, each containing ten packets of heroin and costing $70. Eventually, he would pick up as many as 100 packages every three of four days, each costing $75.

Otero-Colón further testified that, after the POPR searched Reyes-Padilla's Virgilio Dávila apartment, the distribution operation was moved to the apartment of Morales-Santiago, who also kept notebooks reflecting drug deliveries and debts. He stated that Ortiz-Báez and others who worked at the "table" in Isla Verde were right-hand men for Santiago-Lugo. These men would sometimes transport drugs to Los Murales when Otero-Colón could not. When Reyes-Padilla was out of heroin, Santiago would direct Otero-Colón to obtain it from another distribution group and keep the profits.

Hidalgo testified that he supervised cocaine and marijuana distribution at the Los Murales housing project in 1991 and 1992, and that during his tenure, all of the drugs distributed there belonged to Santiago-Lugo. He knew Otero-Colón as an individual who would come to the Virgilio Dávila punto to obtain heroin for Santiago-Lugo's punto at Los Murales.

**D. The Villa Evangelina Punto**

Otero-Colón identified defendant-appellant Eulalio Candelaria-Silva as "Macho Gatillo," the overseer of the drug point at the Villa Evangelina housing project. Otero-Colón testified that he met the Candelaria-Silvas, including Moisés and Luis, after Josean agreed with Santiago-Lugo to distribute cocaine at Los Murales in exchange for a reduction in the price of heroin distributed there. Otero-Colón stated that he would obtain cocaine from Raúl Santiago-Lugo at Virgilio Dávila and transport the drugs to Eulalio and Moisés' house in Manatí for processing to sell at Los Murales and Villa Evangelina. Eulalio Candelaria-Silva would pick up the proceeds from Otero-Colón. Moisés assumed Eulalio's role after the latter was incarcerated.

Otero-Colón testified that the Candelaria-Silvas began to distribute "cristal" at Villa Evangelina. On two occasions in 1990, an undercover

police officer made controlled purchases of cocaine from Eulalio Candelaria-Silva at Villa Evangelina. In addition, POPR officers executed search warrants at the Candelaria home in 1993 and February 1995. The 1993 search yielded controlled substances including "cristal" heroin.

In addition, the government introduced into evidence a letter that had been seized from the residence of Israel Santiago-Lugo in August 1993. The letter was addressed from "Raúl" to "Macho," and indicated that both of them were in jail at the same time. The letter appeared to discuss price negotiations, and refer to members of the Candelaria family.

**E. The Enrique Catoni Punto**

Noemí García-Otero testified that defendant-appellant Rosado-Rosado was introduced to her as "Hormiguita," the supervisor of heroin, cocaine, and marijuana sales at Enrique Catoni. Raúl Santiago-Lugo introduced Ortiz-Báez as "Mickey Mouse." On one occasion, Raul Santiago-Lugo drove Ortiz-Báez to the Ramón-Solá housing project in Arecibo and left him there to supervise. On another occasion, Ortiz-Báez and Rosado-Rosado recruited individuals to distribute drugs at the housing project. In addition, García-Otero identified defendant-appellant Raúl Ortiz-Miranda as someone who would bring drugs to, and pick up money from, the housing project on at least a weekly basis. She testified that she knew Ortiz-Miranda as "Cano Beeper."

**DISCUSSION**

**I. Jury Selection**

Defendant-appellants argue that the district court violated the Fifth and Sixth Amendments, the Jury Selection and Service Act of 1968 ("the Act"), 28 U.S.C. § 1861, Fed. R. Crim. P. 43(b), and the Amended Plan for the Random Selection of Grand and Petit Jurors for the United States District Court for Puerto Rico ("District Plan") by ex parte eliminating jurors from the venire.

**A. The Jury Selection Act**

The Act was enacted to ensure that potential jurors are selected at random from a representative cross-section of the community and that all qualified citizens have an opportunity to be considered for service. See H.R. Rep. No. 1076 (1968), 1968 U.S. C.C.A.N. 1792. The Act provides that each

district court devise a "local plan" for the selection of jurors consistent with the objectives of randomness and nondiscrimination set forth in §§ 1861 and 1862. See § 1863. The local plan for the District of Puerto Rico was devised and approved pursuant to § 1863.

The Act sets forth five specific reasons a summoned juror may be excused by the district court. They are: (1) undue hardship; (2) inability to render impartial service; (3) peremptory challenge; (4) good cause shown; and (5) a determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of the jury deliberations, that the exclusion is warranted, and that the exclusion is not inconsistent with other provisions of the Act. See 28 U.S.C. § 1866(c). Section 1866(c) provides that the court may only exclude a person under (5) in open court.

**1. Jury Orientation**

Of eighty prospective jurors in the panel for this case, only sixty-two appeared for jury orientation on the morning of September 13, 1995. At the orientation, conducted on the record but outside the presence of counsel, the district court gave preliminary instructions regarding jury service and distributed the juror questionnaires. He told the jurors nothing specific about the case except the docket number. The judge then instructed the jurors not to discuss the case with anyone, spoke to them about the importance of jury service, and described the questionnaire. The judge left the courtroom while the jurors viewed the video "Justice by the People" and completed the questionnaires. Upon their completion of the questionnaires, the judge returned and excused the jurors for the day. Because only fifty prospective jurors remained after the morning orientation session on September 13, the court summoned thirteen additional randomly selected prospective jurors from two other panels. These prospective jurors, and one late-arriving member of the original panel, then received substantially the same information and instructions from the judge and completed the questionnaires.

During jury selection the next day, it became clear to Ortiz-Miranda's counsel that some of the juror questionnaires were missing. Upon raising the matter with the district court, the judge explained to counsel that the clerk had "highlighted" certain questionnaires as "problematic," and he

had "dealt with those obvious cases." 9/14/95 Tr. at 126. Ortiz-Miranda's counsel objected to the district court's actions on the ground that it "involv[ed] and invok[ed] Fifth and Sixth Amendment rights." Id. The court overruled counsel's objections, but agreed to provide counsel with the questionnaire forms and invited counsel to further object after reviewing them if counsel found that the court had "exercised the [sic] improper discretion," id., in excusing fourteen prospective jurors brought to his attention by the jury clerk.

**a. Lack of Qualifications Dismissals**

In order to be deemed qualified to serve as a juror on a petit jury in the United States District Court for the District of Puerto Rico, an individual must be a citizen of the United States, eighteen years of age or older, have resided for a period of one year within the judicial district, and be "able to read, write, speak, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the Juror Qualification Form and to render satisfactory jury service in this Court." District Plan at 3.

The district court dismissed six of the prospective jurors based on a lack of proficiency in English. Juror 16 stated that she had difficulty reading or understanding English and answered the question asking her to describe her work in general terms in Spanish. Juror 17 completed almost all of the questionnaire in Spanish. Juror 18 indicated that she had difficulty with English and also wrote in Spanish that she did not hear well. Juror 45 completed the forms entirely in Spanish. Juror 61 indicated that he had trouble with English and did not give more than a one word response in English to any of the questions requiring more than a yes or no answer. Finally, Juror 93 indicated that he had trouble reading or understanding English, but otherwise completed the questionnaire in English. After examining these questionnaires, we hold that Judge Fusté did not err by dismissing these prospective jurors.

The District Plan also mandates that "[n]o person shall be qualified to serve . . . if he is incapable, by reason of mental or physical infirmity, to render satisfactory jury service." Id.

The district court excused two jurors for medical reasons. Juror 13 answered "No" to the question, "Do you have any physical problem (for

example, sight, hearing or other medical condition) that would interfere with your ability to serve?" but a note at the bottom of the form states "Eye ongoing medical [illegible]." The government contends that this note was made by the district court, but the author's identity is unclear. The district court did write on the beginning of the form: "See note [page] 3 claimed ongoing eye impediment." Juror 89 stated that he had "Fibrilosis Atrial" and that he was currently taking daily medication. The district court excused him on account of his health and because of his answer to question #9. Question #9 asked the degree of education the prospective juror had achieved. Juror 89 had a law degree, but was retired.[2] Although the district court's actions, with respect to these two jurors, were questionable in that Juror 13 did not state that his medical condition would interfere with his serving as a juror and Juror 89 was dismissed in part because he holds a law degree, there was at least some medical reason why both jurors could have been excused. Accordingly, these excusals were not an abuse of discretion. See United States v. Contreras, 108 F.3d 1255, 1269 (10th Cir. 1997) (applying abuse of discretion standard to pre voir dire excusals).

**b. Undue Hardship Dismissals**

Both § 1866 and the District Plan permit the district court to excuse prospective jurors prior to voir dire on the ground of "undue hardship." Here, the district court excused six jurors on that basis.

According to the district court's notes, Juror 3 was excused because he was the only person at his office. Juror 3 stated that he "was the only representative of the company in Puerto Rico. I sell generic medicine to Drug [sic] stores and Hospitals [sic] in P.R[.] My Job [sic] is mostly done by telemarketing for which I can not be away from my work for too long. I m [sic] training a part time employee to assist me due the [sic] increase in sales." The district court excused Juror 32 because she was taking care of her mother, who was in the hospital, and her grandmother, who was at home. Although she was the "only one" who could help them, she stated that she would "be very proud to participate as a juror . . . and to let [her] know what [she] should do." According to his notes, Judge Fusté excused

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[2]We note that under the District Plan, an actively practicing attorney may request an exemption from service, but such an exemption is not automatic. See District Plan at 5. In any event, such a request would have been improper in this instance because Juror 89 was retired.

Juror 70 because he was a night shift medical technician at Fajardo Hospital.

Jurors 35, 63, and 72 indicated that they had various business and personal travel plans that would conflict with the trial. Juror 35 stated that she would be traveling during the trial to a "Consumers Affairs annual meeting" and then "intend[ed] to take my vacations." Juror 63 was excused by the district court on account of a pre-arranged vacation. During the trial, she was scheduled to attend a training session and to leave with her family on a previously planned vacation. Finally, Juror 72 was excused because he had a reservation to go to Nevada and California for a month during the trial.

The district court did not abuse its discretion in dismissing Jurors 3 and 32, but did impermissibly excuse Jurors 70, 35, 63, and 72. With regard to Jurors 3 and 32, their questionnaires document that acting as Jurors would work an undue hardship. However, the same cannot be said for the others.

With regard to Juror 70, we note that under the District Plan, he could have requested to be excused from jury duty. The District Plan states that jury service by medical laboratory technicians would entail undue hardship or extreme inconvenience, and such an individual "shall be excused from jury service upon individual request." District Plan at 5 (emphasis added). However, Juror 70 did not request to be excused or object to being a juror. The choice not to serve on the jury at this stage was his and not the court's. The district court acted improperly in unilaterally excusing him from jury service. We cannot be sure whether Juror 70 desired to serve or was unaware of the District Plan's provision. Regardless of his desire or knowledge, however, there was no prima facie reason for him to have been dismissed from the pool at this point.

We begin by noting with respect to Jurors 35, 63, and 72 that the district court incorrectly described their situation to counsel the next morning at jury selection. The district court stated: "What else was there? And people with paid vacations, which they so said in a note, Judge, I'm leaving on such and such a date. How can I detain those people?" 9/14/95 Tr. at 127. After a very close and careful reading of the questionnaires, we did not find any notes on them stating that any of these jurors had paid

vacations. If such a statement was made by any of the jurors to the district court, it was not recorded by the Judge on the questionnaires in the record. Jurors 35 "intend[ed]" to take vacations. For Juror 63, "everything was set." Finally, Juror 72 had a "reservation." It appears that the district court interpreted those phrases to mean paid non-refundable, non-changeable tickets although those phrases may well not have meant that at all.

Jury duty works a burden on all called to serve. There are instances in which previously-made travel plans would cause jury service to become an undue hardship. However, the district court all too willingly accepted the proposed excuses of these jurors without allowing the parties to examine the prospective jurors in voir dire. Exclusions at this stage approach a ministerial function, which is why § 1866 authorizes the clerk of the court under the supervision of the district court -- if the District Plan so authorizes -- to excuse such jurors. See § 1866(c). If jurors are excused as a result of a non-ministerial exercise of discretion better left to voir dire itself, as occurred here, the prospects for the defendant obtaining a fair cross-section of the community could be improperly diminished.

In general, we think it unwise for district judges to engage in ex parte voir dire beyond purely ministerial functions. Ministerial functions permitted by the Plan and Act are usually performed by the clerk, under supervision of the court. If a judge does no more than what a jury clerk is authorized to do in excusing jurors, that may raise an issue of allocation of court resources but does not raise an issue of impropriety. See United States v. Calaway, 524 F.2d 609, 619 (9th Cir. 1975). When the court, in the absence of counsel, starts questioning jurors and excusing them based on responses which go beyond basic information about qualifications, obvious bias, or hardship, it is all too easy to slip over the line, as happened here. Whether slipping over the line deprives a defendant of statutory or constitutional rights is another question.

**2. The Remedy**

Having established that certain of the exclusions were not justified under the Act, we turn to the question of whether the Act provides appellants with a remedy. By its terms, the Act only provides a remedy -- the stay of proceedings pending the selection of a petit jury in conformity with the Act -- for substantial failures to comply with its provisions. See §

1867(d); United States v. Calabrese, 942 F.2d 218, 226 (3d Cir. 1991). In order to obtain this remedy, a party challenging the jury selection process under the Act must make his challenge "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." § 1867(a). The timeliness requirement "is to be strictly construed, and failure to comply precisely with its terms forecloses a challenge under the Act." United States v. Paradies, 98 F.3d 1266, 1277 (11th Cir. 1996) (citation omitted). "[O]nce voir dire begins, Jury Selection Act challenges are barred, even where the grounds for the challenge are discovered only later." Id. at 1278 (emphasis added) (citations omitted). The Act requires that any motion filed be accompanied by a "sworn statement of facts which, if true, would constitute a substantial failure to comply with provisions of [the Act]." § 1867(d). When that requirement is not satisfied, the challenge to the selection process must fail, because "Congress left no room for ad hoc review of the usefulness of compliance with [the sworn statement] requirement." Paradies, 98 F.3d at 1278 (citation omitted).

Ortiz-Miranda's counsel objected after the district court gave counsel the list of the remaining prospective jurors and his instructions for making challenges. She stated the reasons for her objection and the district court took notice. See 9/14/95 Tr. at 129. Counsel next asked if the transcript was available. See id. The court stated: "The transcript is not available." Id. Counsel next asked for a continuance, which was denied. See id. But, the district court told counsel that she "can examine the forms" and that there would be "an accounting made by the jury clerk," id. at 129-30, but that it would not be done "now," id. at 130, because there was "[n]o need to do that now." Id.

With a transcript of the above events, it would seem that there would be no quarrel as to what occurred. Unfortunately, that is not the case. In a Memorandum Order dated August 11, 1998, the district court took issue with Ortiz-Miranda's brief, stating: "Contrary to what is stated in the brief on appeal, counsel for all defendants, as well as trial attorneys for the Department of Justice, were given copies of [the original questionnaires of those excused] before jury selection commenced in the case now on appeal." 8/11/98 Memorandum Order at 1 (emphasis added). He

continued: "The preparation of the photocopies and sets of documents were turned over to counsel before jury selection was supervised . . . and I made certain that all attorneys of record received a set of the pertinent documents so that they could meaningfully participate in the jury selection process." Id. at 2. We note that the parties do not agree with the court's assertion that the materials in the case were turned over to them in the above described fashion. Both the defendant-appellants and the government, relying on the transcript of the proceeding and the materials in the record, state that the materials were turned over to the parties after the commencement of voir dire.

Ortiz-Miranda states that the record does not disclose when the questionnaires were actually provided to counsel. The government contends that the record suggests that "the questionnaires were made available sometime after commencement of voir dire, but on September 14, 1995," Government's Resp. to Ortiz-Miranda's Mot. at 3 (based on a memorandum from the district court to the Clerk of the Court and the Jury Administrator dated that day) or the questionnaires were "filed under seal in the Clerk's Office on September 19, 1995, the day after the presentation of evidence began." Id. (based on Doc. 655 which was signed by Judge Fusté on September 19, 1995).

Under the Act, the challenge along with the signed affidavit must be filed before the commencement of voir dire. Obviously, this was not possible here because the record establishes that jury selection commenced before counsel had any opportunity to discover that prospective jurors had been excused. In any event, we choose not to wrestle with the thorny question of whether the district court's actions mitigated counsel's duty to comply with the Act. Even if all had proceeded ideally, the district court's erroneous exclusions did not constitute a "substantial failure" to comply with the Act. See § 1867(d).

Congress left the content of this term largely up to the courts. See 1968 U.S. C.C.A.N. at 1794 ("Your committee would leave the definition of 'substantial' to the process of judicial decision."). In determining whether a violation is substantial, "the alleged violations must be weighed against the underlying principles of the Act." United States v. Gregory, 730 F.2d 692, 699 (11th Cir. 1984). These principles are: (1) the random selection

of jurors; and (2) the determination of disqualifications, excuses, exemptions, and exclusions on the basis of objective criteria only. See id. The inquiry is as follows:

For wrongful exclusions, determining whether there has been a substantial violation has both quantitative and qualitative aspects. Quantitatively, a substantial violation generally will not be found if the numbers of errors is small. Qualitatively, the inquiry is whether there has been a frustration of the Act's underlying principle of exclusions on the basis of objective criteria only.

Calabrese, 942 F.2d at 227-28 (citation omitted). Here, the number of arguably wrongfully excluded jurors was very small. Further, the Act's principle of exclusions on the basis of objective criteria was not frustrated. In excusing the four individuals, the district court did not engage in qualitatively improper actions such as creating a "new category of exclusions," see id. at 228, or discriminating against a class of persons. See id. Second, the district court did not prevent the jury panel from consisting of a fair cross-section of the community. See United States v. Bearden, 659 F.2d 590, 602 (5th Cir. 1981). His actions, though improper, did not constitute a substantial failure to comply with the Act.

**B. Other Claims**

Defendant-appellants also argue that their rights under the Fifth Amendment, the Sixth Amendment, and Fed. R. Crim. P. 43 were violated by the district court's ex parte actions. To the extent that the district court improperly dismissed four prospective jurors, we conclude that the errors were harmless to the defendants. See id. at 1270 n.11 (stating that the error must be sufficiently egregious to constitute a constitutional violation).

**II. The Macho Gatillo Alias**

Eulalio Candelaria-Silva argues that the district court abused its discretion by refusing to strike his alias, "Macho Gatillo,"[3] from the Superseding Indictment. He contends that the use of the alias was inflammatory, demeaning and prejudicial.

In denying the motion to strike, the district court stated that "Macho

[3]Roughly translated from Spanish, "Macho Gatillo" means "Trigger Man."

Gatillo" served the purpose of a proper name for identification purposes. The record reflects that the POPR officer who conducted two undercover drug purchases from Candelaria-Silva in 1990 knew him only as "Macho Gatillo." In addition, co-conspirator witness Otero-Colón also identified the defendant only by his street name. Furthermore, another POPR officer corroborated these mutually consistent identifications of the defendant by testifying that the defendant was known as "Macho." All of this evidence was probative with respect to identifying Eulalio Candelaria-Silva as the author of the letter seized from Israel Santiago-Lugo's residence -- a letter signed "Macho" that discussed the operations of a punto.

It is true that the record reflects the existence of at least one other individual who answered to the name "Macho." For this reason, the POPR undercover officer and Otero-Colón's use of the "Gatillo" portion of the name, which translates as "trigger," was probative to distinguish the defendant.

Eulalio Candelaria-Silva's argument fails because the evidence of his alias was relevant, and there was no prejudice. See United States v. Delpit, 94 F.3d 1134, 1146 (8th Cir. 1996) (noting that the use of the name "Monster" was necessary to fully identify the defendant); United States v. Persico, 621 F. Supp. 842, 860-61 (S.D.N.Y. 1985) (stating that aliases and nicknames are proper in an indictment where they will be part of the government's proof at trial).

**III. Co-Conspirator Testimony**

Moisés Candelaria-Silva argues that the district court should have excluded the letter seized from the residence of Israel Santiago-Lugo. The court admitted this exhibit pursuant to Fed. R. Evid. 801(d)(2)(E) which defines as non-hearsay a statement by a party's co-conspirator made during and in furtherance of the conspiracy. We find Moisés Candelaria-Silva's argument without merit.

The district court conditionally admitted certain evidence pursuant to Fed. R. Evid. 801(d)(2)(E) after making the requisite findings pursuant to United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir. 1980). Later, the court expressly found that the letter met the "in furtherance of" requirement of 801(d)(2)(E). At the end of trial, the court made the

requisite determination for unconditional admission of the letter and other evidence.

As grounds for exclusion at trial, Moisés Candelaria-Silva argued that there existed a legitimate doubt as to whether Macho Gatillo was a member of this charged conspiracy at the time he wrote the letter. He renews this argument on appeal.

Letters can fall within the co-conspirator exception to the hearsay rule. See United States v. Richardson, 14 F.3d 666, 668-70 (1st Cir. 1994). In this case, there is more than sufficient evidence that the statements in the letter were made by a co-conspirator during and in furtherance of the charged conspiracy. First, the seizure of the letter from Israel Santiago-Lugo's residence and references in the letter to the recipient's brother incline toward a finding that the addressee was Israel Santiago-Lugo's brother, Raúl. Furthermore, the writer, "Macho Gatillo" -- Eulalio Candelaria-Silva -- refers to the involvement of his mother in the transactions discussed. The 1993 seizure of cristal heroin at the Candelaria-Silva residences occurred in the presence of Eulalio Candelaria-Silva's mother and Moisés Candelaria-Silva. In addition, the testimony of Otero-Colón about the Candelaria-Silvas' roles at Villa Evangelina, and the content of the letter, particularly its reference to the specific brand of heroin constitute strong evidence that the letter was prepared by a co-conspirator during and in furtherance of the charged conspiracy. As this Court stated in United States v. Drougas:

The source of the placemats [on which a series of handwritten names and numbers appear], the circumstances surrounding their seizure, the fact that the information corresponded to other evidence of the participants in the conspiracy, and the extreme unlikelihood that such a list would be prepared by one not privy to the operation of the conspiracy provide a sufficient basis to infer that the writings pertained to the conspiracy alleged and were made in furtherance of that conspiracy.

748 F.2d 8, 26 (1st Cir. 1984).

Here, as in Drougas, the extreme unlikelihood that such a letter would be prepared by one not privy to the operation of the "cristal" heroin

conspiracy provides a sufficient basis to infer that the letter pertained to the conspiracy alleged and that the statements therein were made in furtherance of that conspiracy. See Drougas, 748 F.2d at 26. In light of the overall evidence in the case, the references to the specific brand of heroin and the statements about price and quantity, the district court did not clearly err by admitting the evidence.

**IV. Motion in Limine**

**A. Evidence of Prior Dispositions**

Ortiz-Báez, Reyes-Padilla, and Moisés Candelaria-Silva contend that the district court erred in prohibiting them from presenting evidence about the prior dispositions of certain local criminal charges relating to conduct involved in the charged conspiracy. Specifically, the defendants argue that the court's decision prohibited them from presenting a defense. We agree with the district court that the prior dispositions were not admissible.

In deciding this issue, the district court explained that the local prosecutions were not relevant to this prosecution because possible explanations for the early dismissals included "lack of evidence, unavailability of witnesses, sloppy presentation by the state prosecutors, irresponsible legal determinations, and the sort." 9/14/95 Order at 3. Furthermore, the district court rejected the defendants' arguments as "a disguised attempt to argue a double jeopardy defense before the jury." Id. at 4. The district court's order was proper and in accordance with this Court's recent decision in United States v. Smith, 145 F.3d 458, 461 (1st Cir. 1998), holding that an acquittal instruction is not required when evidence of acquitted conduct is introduced.

In Smith, a defendant, indicted for a drug offense and a tax offense, was acquitted of the drug offense after a trial on that charge alone. During the subsequent trial on the tax offense, the government presented evidence of drug trafficking to demonstrate receipt of income that was not reported to the IRS. On appeal, the defendant argued that the trial court erred in refusing to inform the jury of his acquittal on the drug charge and in barring his cross-examination of prosecution witnesses on their knowledge of that acquittal. The defendant in Smith, like the defendants in this case, relied on language in the Supreme Court's decision in Dowling v. United States, 493 U.S. 342 (1990), to support this position. In Dowling, the trial

court instructed the jury that the defendant had been acquitted of robbing a witness and the witness's testimony was admitted for a limited purpose. As we noted when rejecting the defendant's argument in Smith, however, "the sentence in Dowling that begins, 'Especially in light of the limiting instructions' does not identify the language to which 'limiting instruction' refers." Smith, 145 F.3d at 461. Furthermore, since an instruction was given in Dowling, the Supreme Court did not decide the exclusion issue. See Smith 145 F.3d at 461.

The reasons supporting exclusion of evidence about the dismissal of a prior prosecution are even stronger than those that support exclusion with respect to a prior acquittal. As the district court noted, cases are dismissed for many reasons unrelated to the defendant's guilt. The introduction of evidence of a dismissal could well mislead the jury into thinking that a defendant was innocent of the dismissed charge when no such determination has been made.

**B. Certificate of Good Conduct**

Moisés Candelaria-Silva argues that, under Fed. R. Evid. 405, the trial court should have admitted a "certificate of good conduct." See Defendant's Br. at 23-30. The district court, describing the certificate as a "negative criminal record" certified by the Puerto Rico Police, excluded the document. We hold that the certificate of good conduct is not admissible character evidence.

In United States v. DeJongh, 937 F.2d 1 (1st Cir. 1991), the district court declined to admit what this Court described as a "Good Conduct Certificate." This Court upheld exclusion on the ground of insufficient authentication.

Furthermore, the certificate of good conduct does not satisfy Fed. R. Evid. 405, which allows proof of character: (1) by "specific instances of conduct," id., on cross-examination or where "character or a trait of character . . . is an essential element of a charge, claim, or defense," id.; or (2) by "testimony as to reputation or . . . in the form of an opinion." Id. Here, Candelaria-Silva cannot allege that the proffered certificate of good conduct meets either of these requirements.

**V. Judicial Bias**

Defendant Moisés Candelaria-Silva contends that the trial court exhibited judicial bias when it: (1) ruled on numerous evidentiary issues during trial; and (2) chastised counsel in front of the jury. See Defendant's Br. at 35-40. On review, this Court considers "isolated incidents in light of the entire transcript so as to guard against magnification on appeal of instances which were of little importance in their setting." United States v. Montas, 41 F.3d 775, 779 (1st Cir. 1994) (internal quotation marks and citations omitted). Furthermore, this Court must "differentiate between expressions of impatience, annoyance or ire, on the one hand, and bias or partiality, on the other hand." Logue v. Dore, 103 F.3d 1040, 1045 (1st Cir. 1997). On several occasions, this Court has held that a trial judge's frustration displayed at sidebar does not deprive a defendant of a fair trial. See, e.g., United States v. Polito, 856 F.2d 414, 417-19 (1st Cir. 1988) (no bias where, at sidebar, judge warns defense counsel that he is being reported to the State Bar Association for violating rules of professional conduct); Deary v. City of Gloucester, 9 F.3d 191, 194-96 (1st Cir. 1993) (no bias where, at sidebar, the trial judge told defense counsel his cross-examination of a witness was "very devious"). Here, Moisés Candelaria-Silva has failed: (1) to demonstrate that the trial court's actions rise to the level of bias; and (2) to meet his burden of demonstrating serious prejudice.

Moisés Candelaria-Silva complains that a number of evidentiary rulings show bias. We have examined those rulings and find they were all proper in the exercise of the court's discretion. Accordingly, Moisés Candelaria-Silva does not demonstrate judicial bias with his complaints concerning: (1) the use of the charts prepared by the government; (2) the display of photographs of firearms, ammunition and drugs to the jury; (3) the admission of testimony of an expert witness to explain the drug ledgers; (4) the exclusion of evidence of prior acquittals; (5) the exclusion of defense impeachment evidence concerning past instances of untruthfulness; (6) the exclusion of a utility bill to establish Moisés Candelaria-Silva's place of residence as different from his mother's house; (7) the district court's application of Fed. R. Evid. 801(d)(2)(E); (8) its admission of evidence of allegedly unrelated murders and misconduct by defendants; or (9) its alleged approval of the government's use of leading questions.

Similarly, Moisés Candelaria-Silva's complaint about the trial court's

"facial expressions," Defendant's Br. at 37, falls short of the mark. The transcript indicates that after an extensive discussion among all defense counsel, at least two defense counsel indicated that the district judge did not cover his mouth or make faces when weapons were introduced into evidence. See 10/27/95 Tr. at 1861. Perhaps one defense counsel accurately summed up the situation when he remarked: "I would also say for the record, I have been able to perceive a very high tension among all counsel. And that every small incident, in my opinion, is blown out of proportion." Id. at 1883-84.

Assuming arguendo that the trial court exhibited frustration from time to time during this rather lengthy, heated trial, the strong instructions given by the trial court during and at the end of the trial should have eliminated any conceivable prejudice. For example, shortly after the bench conference regarding facial expressions, the district court instructed the jury:

Remember also what I told you at the beginning, when we started the first day when I impaneled you. Nothing that the court may say or do during the course of this trial is intended to indicate nor should be taken by you as indicating what your verdict should be. Also, as you have perceived, throughout this trial, trial practice is very demanding of judges and attorneys and sometimes there exists at a given trial colloquy between the court and counsel. This colloquy sometimes is easy going and sometimes I, as a judge, have to take a stand to keep proceedings returning in an orderly way. It is very important for all of you to understand that any colloquy between court and counsel is not to be considered by you in determining the issues of this case.

Id. at 1995. Such jury instructions are an appropriate means to "allay[] potential prejudice." Logue, 103 F.3d at 1046-47 (citation omitted).

Thus, Moisés Candelaria-Silva has failed to meet his burden of showing serious prejudice.

**VI. Rule 16**

Ortiz-Miranda argues that the district court should have suppressed García-Otero's identification testimony as the fruit of a Rule 16 discovery violation. Although Ortiz-Miranda argued for suppression of the identification on the merits in the district court, see 11/16/95 Tr. at 3449-52, 3479-82, he never sought suppression as a discovery sanction. Therefore, this argument is waived. See United States v. Barnett, 989 F.2d 546, 554 (1st Cir. 1993) ("Issues not squarely raised in the district court will not be entertained on appeal.").

**VII. Jury Instructions**

Ortiz-Miranda argues that the evidence at trial mandated an instruction explaining the particular concerns attendant to eyewitness identification and explicitly stating that a guilty verdict required a finding of identity beyond a reasonable doubt. See Defendant's Br. at 46. However, we have expressly "declined to adopt . . . a rule of per se reversal [for such an error], choosing not to constrain district courts with yet another mandatory requirement." United States v. Angiulo, 897 F.2d 1169, 1206 n.20 (1st Cir.) (citing United States v. Kavanaugh, 572 F.2d 9, 13 (1st Cir. 1978)), cert. denied, 498 U.S. 845 (1990).

Contrary to Ortiz Miranda's assertion, he was not entitled to a particular instruction on the facts of this case. As this Court further stated in Angiulo:

[T]he refusal to give a particular requested instruction, however, is reversible error only if the instruction (1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense.

897 F.2d at 1205 (internal quotation marks and citations omitted).

Here, Ortiz-Miranda has not satisfied the second and third prongs of the Angiulo test. First, the district court's charge substantially covered the identification issue:

Let's now discuss the subject of how is it that you gauge or assess the

credibility of witnesses. In making that decision, you may take into account a number of factors, including the following:

One, was the witness able to see or hear or know the things about which that witness testified?

Two, what kind of opportunity did the witness have to observe facts or identify people, including the accused?

Three, how well was the witness able to recall and describe those things or persons observed?

Four, how positive was the witness' recollection of facts and the identification of people, including those accused?

Five, what was the witness' manner while testifying? By "manner," I mean appearance, demeanor.

Six, . . . was the witness ever confused as to facts or the identification of persons, or did he or she misidentify or fail to identify a person or the accused on prior occasions?

12/1/95 Tr. at 4554-55 (emphasis added).

Second, García-Otero testified twice at trial, and thus Ortiz-Miranda had ample opportunity to develop the identification defense during cross-examination, the presentation of defense evidence, and closing argument. Since the court's jury instructions addressed the identification issue three times, Ortiz-Miranda's "ability to effectively present" the identification defense was not "seriously impaired." Angiulo 897 F.2d at 1205-06.

**VIII. Failure to Disclose and Newly-Discovered Evidence**

Ortiz-Miranda argues that the government's failure to disclose during trial its knowledge of Rivera-Meléndez's whereabouts, his possession of a green motorcycle, his involvement in certain criminal activity, and his association with the alias "Cano Beeper" in POPR records, constituted a due process violation warranting reversal pursuant to Brady v. Maryland, 373 U.S. 83 (1972), and Kyles v. Whitley, 514 U.S. 419 (1995). Ortiz-

Miranda also argues that newly discovered evidence from a witness who began cooperating after conclusion of the trial independently and cumulatively mandates a new trial. Ortiz-Miranda's claims fail because, as the district court correctly concluded, there is no "reasonable probability" that disclosure of the Brady material during trial would have resulted in Ortiz-Miranda's acquittal. See Gilday v. Callahan, 59 F.3d 257, 267 (1st Cir. 1995), cert. denied, 516 U.S. 1175 (1996). Nor, as the district court concluded, does the combination of the Brady material and newly-discovered evidence create such a "reasonable probability."

Ortiz-Miranda's motion for a new trial does not specifically cite the failure to disclose Rivera-Meléndez's location as grounds for relief. Rather, his counsel placed this information in an "Affirmation" appended to the motion. Thus, although the district court heard evidence on this issue at the hearing, it did not specifically consider it in the Brady analysis. The draft search warrant affidavit did not contain information about the sighting of Rivera-Meléndez because that event did not occur until after the prosecutor had declined to authorize Rivera-Meléndez's arrest. In its analysis of the draft affidavit, however, the district court assumed the availability of Rivera-Meléndez and determined that such availability would not have created a reasonable probability of Ortiz-Miranda's acquittal. First, the court found it improbable that Rivera-Meléndez would exculpate Ortiz-Miranda by implicating himself. See United States v. Ortiz-Miranda, 931 F. Supp. 85, 93 (D.P.R. 1996). Furthermore, the court found it improbable that García-Otero would recant her identification of Ortiz-Miranda or her failure to identify Rivera-Meléndez even if the defense produced Rivera-Meléndez. See id.

Ortiz-Miranda does not elaborate on how Rivera-Meléndez's "very presence in court," Defendant's Br. at 35-36, would otherwise have created a reasonable probability of acquittal. Such a claim is especially questionable because the jury already had the benefit of comparing photographs of the two men when assessing the accuracy of García-Otero's identification of Ortiz-Miranda. The government, while conceding the possibility that Rivera-Meléndez could also be involved with Israel Santiago-Lugo's organization, reasonably argued in closing arguments that the testimony of García-Otero and other evidence nonetheless established the guilt of Ortiz-Miranda.

With respect to the draft probable cause affidavit itself, the district court determined that it "favor[ed]" the misidentification claim insofar as it did not contradict the Department of Transportation information about the green motorcycle and suggested Rivera-Meléndez's involvement in drug trafficking. It did not, however, exculpate Ortiz-Miranda. See Ortiz-Miranda, 931 F. Supp. at 92-93. Similarly, the district court correctly recognized that although the missing page of the criminal history report would have "favored" the defense by attributing the alias "Cano Beeper" solely to Rivera-Meléndez, the government perhaps could have established that the POPR database was incomplete. See id. at 93.

As the district court recognized, it is the "reasonable probability" standard that distinguishes merely "favorable" evidence from "material" evidence, the intentional or unintentional withholding of which violates a defendant's due process rights. See Gilday, 59 F.3d at 267. On this record, we agree with the district court that "the sum of evidence withheld is hardly of the variety that would undermine our confidence in the outcome of the trial." Ortiz-Miranda, 931 F. Supp. at 94.

Finally, Ortiz-Miranda summarily asserts "prosecutorial misconduct" as grounds for reversal. In view of the fact that he neither develops this argument nor cites any supporting authority, we reject this argument out of hand. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[A] litigant has an obligation to spell out its arguments squarely or distinctly, or else forever hold its peace.").

**IX. Sufficiency of the Evidence**

First, with respect to Count 46, conspiracy to possess cocaine and other controlled substances with the intent to distribute, Moisés Candelaria-Silva argues that the evidence was insufficient because the POPR investigation that led to the seizure did not link him to the Sabana Seca residence where the seizure occurred. This claim fails because to obtain a conviction, the investigative officers need not identify all the perpetrators prior to arrest. Here, the testimony of Otero-Colón about the Candelaria-Silva family's use of the Sabana Seca residences to process cocaine and other drugs for distribution well supported the jury's verdict as to his involvement in the

conduct charged in Count 46.

Second, Rosado-Rosado and Moisés Candelaria-Silva argue that the evidence established the existence of separate conspiracies. We find their argument to be without merit.

The evidence presented at trial established that there was an overarching conspiracy headed by Israel Santiago-Lugo to distribute controlled substances, including heroin, cocaine, and marijuana. The drugs were distributed at various places and by various people, including members of the Candelaria family. As noted in United States v. Wihbey, "[t]he question whether a given body of evidence is indicative of a single conspiracy, multiple conspiracies, or no conspiracy at all is ordinarily a matter of fact; a jury's determination in that regard is subject to review only for evidentiary sufficiency." 75 F.3d 761, 774 (1st Cir. 1996) (citing United States v. David, 940 F.2d 722, 732 (1st Cir.), cert. denied, 502 U.S. 989 (1991)).

Here the trial court expressly charged the jury on the multiple conspiracy defense:

You must decide whether the conspiracy charged in the indictment existed and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

12/1/95 Tr. at 4569-70. Thus, the jury verdict can be viewed as a rejection of the multiple conspiracy claim. Wihbey, 75 F.3d at 775 n.8 (stating that when the district court gives a multiple conspiracy instruction, a guilty verdict "can be seen as an effective rejection of the multiple conspiracy theory").

As noted in United States v. Twitty, 72 F.3d 228 (1st Cir. 1995), the arguments made by the defendant-appellants are not uncommon:
Twitty's argument is a common one in conspiracy appeals. Whenever a

conspiracy involves successive transactions and multiple players, it is usually possible to slice the enterprise into discrete portions. Even a single conspiracy is likely to involve subsidiary agreements relating to different individuals and transactions. And more often than not, none of the agreements is explicit; agreement is inferred from conduct; and the conceptual tests used to distinguish between one conspiracy and many are not sharp edged. See, e.g., United States v. Drougas, 748 F.2d 8, 17 (1st Cir.1984).

Id. at 231 (emphasis supplied).

In Wihbey, this Court, quoting United States v. Glenn, 828 F.2d 855, 858 (1st Cir. 1987), set forth the framework for analyzing a claim that the evidence was insufficient to allow the jury to find a single conspiracy and that, instead, the evidence showed two separate conspiracies:

(1) Is the evidence sufficient to permit a jury to find the (express or tacit) agreement that the indictment charges? (2) If not, is it sufficient to permit a jury, under a proper set of instructions, to convict the defendant of a related, similar conspiracy? (3) If so [i.e., the answer to (2) is yes], does the variance affect the defendant's substantial rights or does the difference between the charged conspiracy and the conspiracy proved amount to "harmless error?"

75 F.3d at 773. "Put differently, so long as the statutory violation remains the same, the jury can convict even if the facts are somewhat different than charged -- so long as the difference does not cause unfair prejudice." Id. (internal quotation marks and citation omitted).

Analyzing this case under the first prong of the Glenn test, the evidence is clearly sufficient to permit a jury to find that appellants Rosado-Rosado and Moisés Candelaria-Silva joined the overarching conspiracy charged in Count I. Assuming arguendo, as in Wihbey, that there was insufficient proof that appellants Rosado-Rosado and Moisés Candelaria-Silva were members of the overarching conspiracy alleged in Count I, still, the second prong of the Glenn test would be answered in the affirmative. For example, Moisés Candelaria-Silva largely concedes that the evidence was sufficient to convict him of the statutory offense charged in Count I --

engaging in a conspiracy in violation of 21 U.S.C. 846. Likewise, appellant Rosado-Rosado states: "It is the contention of . . . appellant that the overt acts for which evidence was presented against him relate -- if at all [--] to separate and distinct drug operation or conspiracy." Defendant's Br. at 8. Regardless of this assertion, however, both Otero-Colón and García-Otero testified as to their involvement in a conspiracy with him.

Since the second prong of the Glenn test is answered in the affirmative, to obtain a reversal, appellants must meet their burden under the third prong of the Glenn test -- that as a result of the variance, they were unfairly prejudiced. See Wihbey, 75 F.3d at 773. In Wihbey, the Court noted that there were at least three ways in which such a variance might prejudice the accused. First, a defendant may receive inadequate notice of the charge against him and thus is taken by surprise at trial. Second, a defendant may be twice subject to prosecution for the same offense. Third, a defendant may be prejudiced by "evidentiary spillover"--the "transference of guilt" to a defendant involved in one conspiracy from evidence incriminating defendants in another conspiracy in which the particular defendant was not involved. See id. at 774.

Like the appellants in Wihbey, the appellants here have failed to carry their burden of establishing unfair prejudice. Appellants have clearly failed to establish the applicable test with respect to a claim of prejudicial spillover -- "prejudice so pervasive that a miscarriage of justice looms." Id. at 776 (internal quotation marks and citation omitted). Here, the jury clearly assessed the evidence against each defendant separately. This is demonstrated by the fact that the jury declined to reach any verdict as to defendant Andrades-Marrero. See 12/13/95 Tr. at 5093. Thus, appellants have not established unfair prejudice.

Accordingly, defendant-appellant's "multiple conspiracy" argument is rejected.

**X. Factual Findings at Sentencing**

**A. Ortiz-Miranda**

In challenging his sentence, Ortiz-Miranda argues that the district court erroneously attributed 1.5 kilograms of cocaine base to him based upon extrapolating from an "average" dosage amount. Upon review, we

conclude that the record supports the district court's determination.

The district court properly considered testimony concerning at least ten total cocaine base deliveries directly involving Ortiz-Miranda at the puntos in Arecibo and Vega Baja. This estimate was based upon the trial testimony of García-Otero and testimony at the hearing on the motion for a new trial. In addition, Ortiz-Miranda had been arrested at the Arecibo location with approximately 596 capsules of cocaine base in July 1994, and Ortiz-Báez had been arrested near there in 1995 with over 1200 capsules containing a total amount of 196 grams of cocaine base.

García-Otero testified that at least 500 capsules of cocaine base were distributed on a weekly basis in Vega Baja, and that Ortiz-Miranda made approximately six deliveries. Thus, a conservative estimate of Ortiz-Miranda's direct involvement with 6,000 capsules at the two locations would yield one kilogram of cocaine base and a higher weight of the total mixture containing it, the capsules. See USCG § 2D1.1(c)*(A) ("weight of a controlled substance . . . refers to the weight of any mixture or substance containing [it]"). In addition, the district court could reasonably infer that the additional deliveries of at least 3,000 capsules, yielding approximately another one-half kilogram of cocaine base to the Arecibo location would have been reasonably foreseeable to Ortiz-Miranda as part of the conspiracy. Here, even using a conservative estimate, the district court properly attributed 1.5 kilograms of cocaine base to Ortiz-Miranda.

**B. Eulalio Candelaria-Silva**

Eulalio Candelaria-Silva argues that, because the firearms seized from the Sabana Seca buildings were "out of reach," not used, and not definitively linked to him, the district court erred in imposing the two-level increase to his guidelines offense level pursuant to USCG § 2D1.1(b)(1). However, at sentencing, Candelaria failed to challenge the link between himself and the firearms. As a result, we reject his claim. See Barnett, 989 F.2d at 554 ("raise-or-waive" rule not relaxed where evidence supports sentencing findings).

At sentencing, the district court correctly rejected Candelaria's claim that a relationship between the drugs and the firearms was "clearly improbable." 4/19/96 Tr. at 12. Specifically, the district court determined that "in the

context of the evidence . . . there [was] no doubt . . . that the weapons . . . had a definite, clear connection with drug trafficking." Id. at 13-14. The court stated further:

[T]hese were not hunting weapons. These were not a collection of weapons. This was not a weapon had, like many people do, to just defend their home in the event some burglar comes in . . .These were loaded AK-47s and Ar-15s, we're talking about assault rifles.

Id. After reviewing the record, we uphold the district court's determination.

**C. Ortiz-Báez**

At sentencing, Ortiz-Báez acknowledged his involvement as a core member of the conspiracy. Specifically, he acknowledged working at the "table" in Isla Verde and going "out hunting for people to kill them [during the drug war with the Rosarios]." Defendant's App. at 58. In fact, his candor so impressed the judge that the judge adjusted his offense level for acceptance of responsibility. See Ortiz-Báez Sentencing Findings at 2.

Ortiz-Báez now maintains, however, that the sentence imposed was "exaggeratedly harsh," and alleges that the government was retaliatory in seeking a three-level, as opposed to two-level, adjustment, pursuant to USCG § 3B1.1(b), for his role in the offense. Contrary to his assertions, however, the record reflects that, because Ortiz-Báez's relevant conduct clearly involved five or more participants, he is not eligible for the mere two-level adjustment pursuant to USCG § 3B1.1(c). Thus, the district court did not clearly err.

**D. Reyes-Padilla and Morales-Santiago**

Reyes-Padilla argues that the district court should have imposed a lower sentence because of her age, medical condition and rehabilitative efforts. See Defendant's Br. at 10-11. At sentencing, however, she raised none of these claims, preferring instead to argue that she had withdrawn from the conspiracy after the 1989 execution of search warrants at her Virgilio Dávila apartment. See Defendant's App. at 66-79. Notwithstanding this waiver, age and health are not ordinarily relevant sentencing factors, see USCG §§ 5H1.1 & 5H1.4, and Reyes-Padilla makes no argument that age

and health in this case constitute a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." USCG § 5K2.0. Furthermore, her rehabilitation claim is belied by the fact that, at sentencing, she refused to acknowledge participation in the conspiracy after 1989. See Defendant's App. at 71. The record supports the sentence imposed.

Morales-Santiago also argues that the district court erred in determining her relevant conduct, pursuant to USCG § 2D1.1, and in denying her an adjustment for acceptance of responsibility, pursuant to USCG § 3E1.1. See Defendant's Br. at 7-8. Although Morales-Santiago has provided no transcript of the sentencing proceedings, the available record supports the district court's determination. The record reflects that, during at least part of the conspiracy, Morales-Santiago was charged with storing large quantities of controlled substances, directly providing Israel Santiago's distributors with those controlled substances, collecting proceeds, and maintaining accounting records. As such, the expansiveness of the distribution conspiracy was reasonably foreseeable to her even though she may not have participated in every transaction. Furthermore, contrary to Morales-Santiago's assertions, the Presentence Report ("PSR") at 30-31 does reflect a "thorough explanation of her participation in the case at hand" when viewed in the context of the trial testimony of Hidalgo and Otero-Colón. Thus, Morales-Santiago's claim has no merit.

**XI. Forfeiture of the Montañez Property**

Reyes-Padilla makes six separate objections to the inclusion of the Montañez Property in the Final Order of Forfeiture: (1) that there was no evidence that the property was traceable to drug proceeds; (2) that she was denied the opportunity to have the forfeiture determined by a jury; (3) that there was no principal asset for which the Montañez property could properly be substituted; (4) that forfeiture of the property constitutes double jeopardy; (5) that the government waived its right to forfeit the property as a substitute asset when it withdrew it from Count 49; and (6) that her joint and several liability for the full amount realized by the conspiracy violates the Excessive Fines Clause of the Eighth Amendment. None of Reyes-Padilla's arguments is compelling.

**A. Forfeiture of a Substitute Asset**

A criminal forfeiture order may take several forms. First, the government is entitled to an in personam judgment against the defendant for the amount of money the defendant obtained as proceeds of the offense. Second, to the extent the government can trace any of the proceeds to specific assets, it may seek the forfeiture of those assets directly pursuant to 21 U.S.C. § 853(a)(1). Third, if as a result of some act or omission of the defendant, the government cannot trace the proceeds to specific assets, it may seek the forfeiture of "any property, cash or merchandise, in satisfaction of the amount of criminal forfeiture to which it is entitled." United States v. Voight, 89 F.3d 1050, 1088 (3d Cir. 1996); see 21 U.S.C. § 853(p) (authorizing forfeiture of substitute assets).

In Voight, the Third Circuit held that a defendant convicted of laundering $1.6 million was required to forfeit that amount as a money judgment. See 89 F.3d at 1084. When the government could not directly trace any forfeitable proceeds to the defendant's current assets, the court held that the government could satisfy the $1.6 million judgment by seeking forfeiture of the defendant's assets as substitute assets. See id. at 1088.

Similarly, in this case, the district court ordered forfeiture of the Montañez property as a substitute asset to satisfy, at least in part, the $6,000,000 money judgment set forth in the preliminary order of forfeiture because the government established that it could not trace any of the criminal proceeds into any of the defendant's current assets.

In this context, failure to establish any nexus between the MONTAÑEZ property and the conspiracy is irrelevant. In fact, such a nexus would render forfeiture of the property as a substitute asset unnecessary. See Voight, 89 F.3d at 1086 ("[t]he substitute asset provision comes into play only when forfeitable property cannot be identified as directly 'involved in' or 'traceable to' [the criminal activity]").

To obtain an order forfeiting property as a substitute asset, the government need only comply with the requirements of § 853(p). In particular, substitute assets may be forfeited if the government shows that, as a result of any act or omission of the defendant, the forfeitable property "(1) cannot be located upon the exercise of due diligence; [or] (2) has been transferred or sold to, or deposited with, a third party." § 853(p)(1) & (2).

Here, the government complied with § 853(p) by submitting a motion and affidavit that recited the efforts the government had made to locate the proceeds of the drug conspiracy that would have been directly forfeitable under § 853(a). See Defendant's App. at 121-24 (Affidavit of Special Agent Felicia Ramos-Andino). The affidavit concluded that Reyes-Padilla had "dissipated or otherwise disposed of the proceeds of her drug trafficking," id. at 123, so that the proceeds could not, despite the exercise of due diligence, be located. See id. at 123-24. Based on this record, it was not error for the district court to order the forfeiture of "other property of the defendant," § 853(p), up to the amount described in the money judgment. See § 853(p); United States v. Hurley, 63 F.3d 1, 23-24 (1st Cir. 1995) (affirming forfeiture of substitute assets under identical provision in 18 U.S.C. § 1963(m)).

**B. Determination of Assets**

Reyes-Padilla contends that she was denied the right to have the jury determine whether the Montañez Property could be forfeited. She also asserts that there was no "principal asset" for which the Montañez Property could properly be substituted.

The forfeiture of substitute assets is a matter left solely to the court. See Hurley, 63 F.3d at 23 ("the statute says that an order substituting assets is to be made by 'the court'"). As this Court explained in Hurley, the defendant has a right to have the amount subject to forfeiture determined, in the first instance, by the jury. See 68 F.3d at 23; see also Fed. R. Crim. P. 31(e) (stating that the initial forfeiture is sought in the indictment and is specified in a special verdict). But the jury has no role in determining, subsequently, whether the property has been dissipated and whether the government is thereby entitled to seek the forfeiture of substitute assets. "Indeed, the government might not even know that substitution is necessary until it seeks to take possession of the property specified in the initial forfeiture order." Hurley, 68 F.3d at 23.

In this case, the jury determined -- by rendering the special verdict -- that the conspiracy realized $6,000,000 in proceeds from the commission of the specified offenses, and that the defendant and others were jointly and severally liable for that amount. Thus, the jury determined that the

$6,000,000 was the "principal asset" subject to forfeiture. In having the jury determine that amount, the defendant was afforded all of the procedural protections regarding the determination of the forfeiture by the jury to which she was entitled.

**C. Double Jeopardy and Waiver**

There is no merit whatsoever in Reyes-Padilla's contention that she was subject to double jeopardy because the government commenced its case with a civil seizure, but concluded it by proceeding under the substitute assets provision of the criminal forfeiture statute. Nor did the government's initial inclusion, and subsequent dismissal, of the Montañez property from Counts 48 and 49 of the Superseding Indictment constitute a waiver of the right to seek forfeiture of the property as a substitute asset.

A completed civil forfeiture of property does not constitute "jeopardy" under the Double Jeopardy Clause, and does not bar the subsequent criminal prosecution and punishment of the defendant whose property was forfeited. See United States v. Ursery, 518 U.S. 267, 274 (1996) (stating that the Supreme Court has consistently concluded that "the Clause does not apply to [civil forfeitures] because they do not impose punishment"). A fortiori, a civil forfeiture action that goes no further than a seizure, and never results in the entry of any civil forfeiture judgment cannot constitute jeopardy. Moreover, this Court has recognized that it is "perfectly proper" to begin a forfeiture action with a civil seizure, and then to convert the action to a criminal forfeiture once an indictment is returned. See United States v. Kingsley, 851 F.2d 16, 18 & n.1 (1st Cir. 1988). Indeed, that procedure is commonplace.

Nor is it uncommon for the government to shift theories of criminal forfeiture -- from direct forfeiture to substitute assets -- upon return of an indictment. We held in Voight that when the government's attempt to forfeit the defendant's property directly was unsuccessful, the remedy was for the government to seek forfeiture of the same property as a substitute asset under § 853(p). See Voight, 89 F.3d at 1088. If, as Voight illustrates, it is proper to seek the forfeiture of property as a substitute asset even after a jury has rejected the government's attempt to forfeit the property directly, then there is no error in allowing the government to dismiss the property from the forfeiture allegation before it goes to the

jury and to seek the forfeiture as a substitute asset after trial. In dismissing the Montañez property from the forfeiture allegation in Count 49, the government simply shifted its theory of forfeiture from § 853(a) to § 853(p). Doing so before submission of the case to the jury was entirely proper in light of the prosecutor's conclusion that there was insufficient evidence to support direct forfeiture under § 853(a).

**D. Excessive Fines Clause**

It is well-established that criminal defendants are jointly and severally liable for forfeiture of the full amount of the proceeds of their criminal offense, and that the imposition of such a forfeiture judgment does not constitute an unconstitutionally excessive fine. See Hurley, 63 F.3d at 23 ("the government can collect [the amount subject to forfeiture] only once but, subject to that cap, it can collect from any appellant so much of that amount as was foreseeable to that appellant"); see also United States v. Simmons, 154 F.3d 765, 769-70 (8th Cir. 1998) (holding that each defendant is jointly and severally liable for all foreseeable proceeds of the scheme and that "the government is not required to prove the specific portion of proceeds for which each defendant is responsible").

In Hurley, we affirmed precisely the action taken here: the imposition of an order substituting other property of each defendant up to the value of the criminal proceeds for which the defendant was jointly and severally liable. In that case, each of the defendants, including the relatively minor participants, was ordered to forfeit substitute assets up to approximately $140 million in value. If holding each defendant jointly and severally liable to forfeit that amount in substitute assets did not violate the Excessive Fines Clause, then the forfeiture imposed on Reyes-Padilla does not.

It is true, as Reyes-Padilla notes, that the Eighth Circuit has held that holding a "secondary figure" jointly and severally liable for the forfeiture of the full amount of the criminal proceeds may constitute an excessive fine if the defendant "reaped little benefit" from the scheme. See United States v. Van Brocklin, 115 F.3d 587, 602 (8th Cir. 1997). Van Brocklin does not aid the defendant.

First, in Hurley, we upheld the imposition of a substitute assets order for

the full amount of the criminal proceeds against relatively low-level participants who reaped little personal benefit from the criminal offense.

Second, in its most recent opinion on the matter, the Eighth Circuit relied on Hurley to uphold a forfeiture order holding the defendants jointly and severally liable for the full amount of the proceeds of a bribery offense, whether or not a given defendant received those funds personally. See Simmons, 154 F.3d at 769.

Third, it is appropriate to hold Reyes-Padilla accountable. Although the district court determined that she was a minor participant in the offense, she served as an important link between Israel Santiago-Lugo and his distributors at the various housing projects. Because she personally received and stored controlled substances at her apartment and at the apartment of Morales-Santiago, personally provided wholesale quantities of controlled substances to Santiago-Lugo's distributors, and also assisted with maintaining records of these transactions, she is appropriately characterized as being "in charge of Santiago Lugo's drug trafficking business at the Virgilio Dávila Housing Project in Bayamón." Defendant's App. at 121 (Affidavit of Special Agent Felicia Ramos-Andino). Reyes-Padilla was at Morales-Santiago's apartment when POPR officers seized approximately $96,000 in currency and the drug ledgers reflecting over $3,000,000 worth of transactions during a one-year period. Given Reyes-Padilla's role, holding her liable for the full amount of the proceeds of the conspiracy falls well within the bounds we prescribed in Hurley.

Finally, Reyes-Padilla does not challenge the $6,000,000 money judgment. Rather, her appeal challenges only the forfeiture of the Montañez property as a substitute asset. The Montañez property has a value of only $169,000. Reyes-Padilla cannot seriously argue that the forfeiture of property valued at that amount is "grossly disproportional" to the gravity of a drug conspiracy that realized millions of dollars in proceeds. See United States v. Bajakajian, 118 S. Ct. 2028, 2036 (1998) (holding that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense"). Accordingly, the forfeiture of Reyes-

Padilla's Montañez property does not violate the Excessive Fines Clause of

the United States Constitution.

**CONCLUSION**

For the reasons stated in this opinion, we **AFFIRM**.

# APPENDIX "B"

United States Court of Appeals
For the First Circuit

No. 96-1711

UNITED STATES
Appellee,

v.

EULALIO CANDELARIA-SILVA,
Defendant, Appellant,

No. 96-1712

UNITED STATES
Appellee,

v.

RAUL ORTIZ-MIRANDA,
Defendant, Appellant.

No. 96-1713

UNITED STATES,
Appellee,

v.

MOISES CANDELARIA-SILVA,
Defendant, Appellant.

No. 96-1714

UNITED STATES,
Appellee,

v.

CELENIA REYES-PADILLA,
Defendant, Appellant.

No. 96-2275

UNITED STATES,
Appellee,

v.

JOSE A. ROSADO-ROSADO,
Defendant, Appellant.

No. 96-2362

UNITED STATES,
Appellee,

v.

NELSON MIGUEL ORTIZ-BEAZ,
Defendant, Appellant,

No. 96-2364

UNITED STATES,
Appellee,

v.

ROSA MORALEZ-SANTIAGO,
Defendant, Appellant.

**Chief Judge Torruella**
**Selya, Soudin, Stahl, Lynch and Lipez, Circuit Judges**

**Entered: March 19, 1999**
**ORDER OF COURT**

Upon consideration of motions,

It is ordered that the motions to join the petition for rehearing and suggestion for a rehearing a banc are granted.

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is further ordered that the petition for rehearing and the suggestion for a rehearing en banc *be denied.*

By the Court
Phoebe Morse, Clerk

BY_____
Chief Deputy Clerk

[cc: Messer: Strafer, Aponte, Velez-Rodriguez, Sanchez-Maceria, Perez-Mayol, Anglada-Lopez, Lizarribar, Watkins, Hernandez-Rivera]

# APPENDIX "C"

**AFFIRMATION OF G. RICHARD STRAFER, ESQ.**
**MADE IN SUPPORT OF PETITION FOR CERTIORARI FILED ON BEHALF OF PETITIONER RAUL ORTIZ MIRANDA**

I, G. Richard Strafer do hereby swear under penalty of perjury, that the following statements are true and correct and are being made pursuant to 28 U.S.C. § 1746.

1. I am an attorney authorized to practice law in the U.S. Court of Appeals for the First Circuit. I was appointed to represent Mr. Raul Ortiz Miranda on appeal in a case entitled United States v Israel Santiago Lugo, Crim. No.95-29 (JAF).

2. Trial in the above-mentioned criminal matter occurred in 1995. Appeals were prosecuted to the Court of Appeals for the First Circuit. The Court of Appeals issued its opinion in 1998, United States v Candelario Silva, 166 F3d 19 (1st Cir. 1999).

3. On February 5, 1999, I filed a Petition For Rehearing on behalf of Raul Ortiz Miranda. The Petition For Rehearing related exclusively to an issue involving jury selection.

4. I was never advised by the U .S. Court of Appeals for the First Circuit that Mr. Ortiz Miranda's Petition For Rehearing had been denied on March 19, 1999, or that Mandate had issued in this case in June 2, 1999. I became aware of these facts just recently when another attorney told me that the Petition had been denied and that Mandate had issued.

At Miami, Florida this 20th day of January 2000.

G. RICHARD STRAFER

**AFFIRMATION OF LYDIA LIZARRIBAR-MASINI, ESQ.**
**MADE IN SUPPORT OF PETITION FOR CERTIORARI**
**FILED ON BEHALF OF PETITIONER RAUL ORTIZ MIRANDA**

I, Lydia Lizarribar-Masini do hereby swear under penalty of perjury, that the following statements are true and correct and are being made pursuant to 28 U.S.C. § 1746.

1. I am an attorney authorized to practice law in the Commonwealth of Puerto Rico. As a CJA panel attorney in the Federal District of Puerto Rico, I was appointed to represent Mr. Jaime Rosado Rosado in a case entitled United States v Israel Santiago Lugo, Crim. No. 95-29 (JAF).

2. Trial in the above-mentioned criminal matter occurred in 1995. Appeals were prosecuted to the Court of Appeals for the First Circuit. The Court of Appeals issued its opinion in 1998, United States v Candelario Silva 166 F.3d 19 (Pt Cir. 1999).

3. On February 5, 1999, a Petition For Rehearing was filed by Raul Ortiz Miranda. The Petition For Rehearing related exclusively to an issue involving jury selection. Mr. Ortiz Miranda contended that the court was deprived of subject matter jurisdiction because of the manner in which the jury was selected.

4. My client, Mr. Jose Rosado Rosado was Mr. Ortiz Miranda's co-appellant. As a result, he adopted Mr. Ortiz Miranda's legal point regarding jury selection and the lack of subject matter jurisdiction.

5. Since February 5, 1999, I have been awaiting a decision regarding Mr. Ortiz Miranda's Petition For Rehearing. The outcome of the Petition For Rehearing was important to my client because if the Court of Appeals ruled in Mr. Ortiz Miranda's favor, my client, Mr. Jose Rosado Rosado would be similarly benefitted.

6. I was never advised by the U.S. Court of Appeals for the First Circuit that Mr. Ortiz Miranda's Petition For Rehearing had been denied on March 19, 1999, or that Mandate had issued in this case in June 2, 1999. I became aware of this fact just recently when another attorney told me that the Petition had been denied and that Mandate had

issued.

At San Juan, Puerto Rico this 23rd day of December 1999.

Lydia Lizarribar-Masini

**AFFIRMATION OF ENRIQUE VELEZ, ESQ.**
**MADE IN SUPPORT OF PETITION FOR CERTIORARI**
**FILED ON BEHALF OF PETITIONER RAUL ORTIZ MIRANDA**

I, Enrique Velez, Esq. do hereby swear under penalty of perjury, that the following statements are true and correct and are being made pursuant to 28 U.S.C. § 1746.

1. I am an attorney authorized to practice law in the Commonwealth of Puerto Rico. As a CJA panel attorney in the Federal District of Puerto Rico, I was appointed to represent Moises Candelaria Silva in a case entitled United States v Israel Santiago Lugo, Crim. No. 95-29 (JAF).

2. Trial in the above-mentioned criminal matter occurred in 1995. Appeals were prosecuted to the Court of Appeals for the First Circuit. The Court of Appeals issued its opinion in 1998, United States v Candelaria Silva 166 F.3d 19 (1St Cir. 1999) .

3. On February 5, 1999, a Petition For Rehearing was filed by Raul Ortiz Miranda. The Petition For Rehearing related exclusively to an issue involving jury selection. Mr. Ortiz Miranda contended that the court was deprived of subject matter jurisdiction because of the manner in which the jury was selected.

4. My client, Moises Candelaria Silva was Mr. Ortiz Miranda's co-appellant. As a result, he adopted Mr. Ortiz Miranda's legal point regarding jury selection and the lack of subject matter jurisdiction.

5 Since February 5, 1999, I have been awaiting a decision regarding Mr. Ortiz Miranda's Petition For Rehearing. The outcome of the Petition For Rehearing was important to my client because if the Court of Appeals ruled in Mr. Ortiz Miranda's favor, my client, Mr. Moises Candelaria Silva would be similarly benefitted.

6. I was never advised by the U.S. Court of Appeals for the First Circuit that Mr. Ortiz Miranda's Petition For Rehearing had been denied on March 19, 1999, or that Mandate had issued in this case in June 2, 1999. I became aware of this fact just recently when another attorney told me that the Petition had been denied and that Mandate had issued.

7. Furthermore, when I submitted my CJA Voucher in March of 1999, the Court of Appeals informed me that the appeal had not terminated. For that reason, my CJA Voucher was returned.

At San Juan, Puerto Rico this day of December 1999.

Enrique Velez

**MADE IN SUPPORT OF PETITION FOR CERTIORARI FILED ON BEHALF OF PETITIONER RAUL ORTIZ MIRANDA**

I, Marlene Aponte do hereby swear under penalty of perjury, that the following statements are true and correct and are being made pursuant to 28 U.S.C. § 1746.

1. I am an attorney authorized to practice law in the Commonwealth of Puerto Rico. As a CJA panel attorney in the federal District of Puerto Rico. I was appointed to represent Ms. Rosa Morales Santiago in a case entitled United States v Israel Santiago Lugo, Crim. No. 95-29 (JAF).

2. Trial in the above-mentioned criminal matter occurred in 1995. Appeals were prosecuted to the Court of Appeals for the First Circuit. The Court of Appeals issued its opinion in 1998, United States v Candelario Silva 166 F.3d 19 (1st Cir. 1999) .

3. On February 5, 1999, a Petition For Rehearing was filed by Raul Ortiz Miranda. The Petition For Rehearing related exclusively to an issue involving jury selection. Mr. Ortiz Miranda contended that the court was deprived of subject matter jurisdiction because of the manner in which the jury was selected.

4. My client, Ms. Rosa Morales Santiago was Mr. Ortiz Miranda's co-appellant. As a result, she adopted Mr. Ortiz Miranda's legal point regarding jury selection and the lack of subject matter jurisdiction.

5. Since February 5, 1999, I have been awaiting a decision regarding Mr.Ortiz Miranda's Petition For Rehearing. The outcomeof the Petition For Rehearing was important to my client because if the Court of Appeals ruled in Mr. Ortiz Miranda's favor, my client, Ms. Rosa Morales Santiago would be similarly benefited.

6. I was never advised by the U.S. Court of Appeals for the First Circuit that Mr. Ortiz Miranda's Petition For Rehearing had been denied on March 19, 1999, or that Mandate had issued in this case in June 2, 1999. I became aware of this fact just recently when another attorney told me that the Petition had been denied and that Mandate had issued.

At San Juan, Puerto Rico this 23rd day of December 1999.

Marlene Aponte

**AFFIRMATION OF SALVADOR PEREZ MAYOL, ESQ.**
**MADE IN SUPPORT OF PETITION FOR CERTIORARI**
**FILED ON BEHALF OF PETITIONER RAUL ORTIZ MIRANDA**

I, Salvador Perez Mayol, Esq. do hereby swear under penalty of perjury, that the following statements are true and correct and are being made pursuant to 28 U.S.C. § 1746.

1. I am an attorney authorized to practice law in the Commonwealth of Puerto Rico. As a CJA panel attorney in the federal District of Puerto Rico, I was appointed to represent Celenia Reyes Padilla in a case entitled United States v Israel Santiago Lugo, Crim. No. 95-29 (JAF).

2. Trial in the above-mentioned criminal matter occurred in 1995. Appeals were prosecuted to the Court of Appeals for the First Circuit. The Court of Appeals issued its opinion in 1998, United States v Candelaria Silva 166 F.3d 19 (1St Cir. 1999).

3. On February 5, 1999, a Petition For Rehearing was filed by Raul Ortiz Miranda. The Petition For Rehearing related exclusively to an issue involving jury selection. Mr. Ortiz Miranda contended that the court was deprived of subject matter jurisdiction because of the manner in which the jury was selected.

4. My client, Celenia Reyes Padilla was Mr. Ortiz Miranda's co-appellant. As a result, she adopted Mr. Ortiz Miranda's legal point regarding jury selection and the lack of subject matter jurisdiction.

5. Since February 5, 1999, I have been awaiting a decision regarding Mr. Ortiz Miranda's Petition For Rehearing. The outcome of the Petition For Rehearing was important to my client because if the Court of Appeals ruled in Mr. Ortiz Miranda's favor, my client, Ms. Celenia Reyes Padilla would be similarly benefitted.

6. I was never advised by the U. S. Court of Appeals for the First Circuit that Mr. Ortiz Miranda's Petition For Rehearing had been denied on March 19, 1999, or that Mandate had issued in this case in June 2, 1999. 1 became aware of this fact just recently when another

attorney told me that the Petition had been denied and that Mandate had issued.

At San Juan, Puerto Rico this  day of December 1999.

Salvador Perez Mayol